80-939

No. ——

Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ELECTION COMMISSION, PETITIONER

v.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Whether a Commission determination to dismiss an administrative complaint was within its prosecutorial discretion, requiring affirmance by the court of appeals, where the determination was based upon a reasonable construction of FECA which the Commission had consistently applied in prior cases raising the precise issue.

Whether the Commission's consistent interpretation of 2 U.S.C. § 441a(d)(3) as not prohibiting the expenditure of "§ 441a(d) monies" by national committees of political parties acting as agents for state committees of political parties is supported by a rational basis requiring affirmance by this Court.*

*In addition to the parties named in the caption, the other parties to the proceeding below were the National Republican Senatorial Committee, Intervenor.

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v.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Federal Election Commission ("the Commission") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. C, *infra* at 26) is not yet officially reported. The court of appeals reversed an order of the United States District Court for the District of Columbia. The district court had held that the Commission did not act contrary to law when it dismissed a complaint filed by the Democratic Senatorial Campaign Committee ("DSCC") which alleged that the National

Republican Senatorial Committee ("NRSC") had violated the Federal Election Campaign Act ("FECA" or "the Act"). The order and opinion of the district court (App. B, *infra* at 21) is not officially reported. The determination of the Commission, dismissing DSCC's complaint (App. A, *infra* at 17) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1980 (App. D, E, *infra* at 70, 72). A petition for rehearing, application to recall mandate, and suggestion for rehearing *en banc* were denied on October 11, 1980 (App. F, G, *infra* at 73, 74). Jurisdiction is conferred by 2 U.S.C. § 437g(a)(9), 28 U.S.C. § 1254(1) (1980).

STATUTES INVOLVED

2 U.S.C. § 437g(a)(8), (9) provides in pertinent part:

> (8)(A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1) * * * may file a petition with the United States District Court for the District of Columbia * * *.
>
> (C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint * * * is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

2. U.S.C. § 441a(d)(3) provides:

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

(A) In the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner of any other State, $10,000.

2 U.S.C. § 441a(a)(4) provides in pertinent part:

(4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local com-

mittees (including any subordinate committee thereof) of the same political party * * *

STATEMENT OF THE CASE

DSCC filed an administrative complaint with the Commission on May 9, 1980, alleging that NRSC violated FECA by acting as the agent of various state Republican Party committees under 2 U.S.C. § 441a(d)(3). The Commission unanimously determined by a 6–0 vote, on July 11, 1980, that there was no reason to believe that NRSC had violated FECA as alleged in the DSCC complaint (App. A, *infra* at 17). The Commission's dismissal of the DSCC complaint was consistent with two prior enforcement matters in which the Commission had been urged to construe § 441a(d)(3) to prohibit NRSC's agency agreements (Matters Under Review ("MURs") 780, and 820, App. A, *infra* at 18, 19.

Thereafter, on July 30, 1980, DSCC filed a petition in the United States District Court for the District of Columbia to review the Commission's determination. Based upon cross motions for summary judgment and full oral argument, the district court affirmed. App. B, *infra* at 21. DSCC appealed the order of the district court on September 3, 1980, and requested an expedited briefing and argument schedule in the court of appeals. The court of appeals ordered that the Commission file its brief on September 22, 1980, that oral argument be held on September 23, 1980, and that DSCC file its reply brief after an oral argument. Fol-

lowing oral argument, the court (through both the clerk's office and the court's chief staff counsel) requested additional evidentiary submissions from the parties and, on October 9, 1980, reversed the district court judgment, declaring the Commission's action to be contrary to law. 2 U.S.C. § 437g(a)(8)(C). In addition, the court issued its mandate, directing the Commission to conform with its decision forthwith. App. E, *infra* at 72. *See* Rule 41(a) F.R.A.P.

On October 10, 1980, while the Commission was endeavoring to conform with the court's decision within the 30-day statutory deadline, 2 U.S.C. 437g(a)(8)(C), intervenor NRSC filed an application to recall mandate and a petition for rehearing and suggestion for rehearing *en banc* which were denied on October 11, 1980. On October 17, 1980, however, this Court granted a stay of the appellate court's judgment. App. H, *infra* at 76.

REASONS WHY THE WRIT SHOULD ISSUE

I. THE COURT OF APPEALS CLEARLY ERRED BY REVERSING THE COMMISSION'S CONSISTENT INTERPRETATION OF AN IMPORTANT PROVISION OF THE FEDERAL ELECTION CAMPAIGN ACT

A. CONGRESS ESTABLISHED THE COMMISSION WITH EXCLUSIVE JURISDICTION FOR THE ENFORCEMENT OF FECA

The Federal Election Commission was created by statute in 1974 as the agency with exclusive authority to "administer, seek to obtain compliance with, and formulate policy with respect to [FECA]." 2 U.S.C.

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§ 437c(b).[1] In order to provide centralization and uniformity, the Commission was vested with exclusive jurisdiction for civil enforcement of the Act. 2 U.S.C. §§ 437c(b)(1), 437d(e).[2]

Moreover, to implement the Commission's enforcement authority, Congress enacted detailed administrative enforcement procedures designed to ensure the impartial disposition of complaints which, in many instances, are filed in the highly charged atmosphere of a pending federal election. Thus, pursuant to 2 U.S.C. § 437g(a), any person who believes a violation of the Act has occurred may file a complaint with the Commission. The Commission must notify any person alleged to have committed such a violation

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[1] The Federal Election Campaign Act of 1971 ("the Act" or "FECA"), Pub. L. No. 92-225, 86 Stat. 3, was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263; by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475; by the Federal Election Campaign Act Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1655; and by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339.

[2] 2 U.S.C. § 437c(b)(1) states: "The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and chapter 95 and chapter 96 of title 26. The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions." 2 U.S.C. § 437d(e) states: "*Exclusive civil remedy for enforcement.* Except as provided in section 437g(a)(8) of this title, the power of the Commission to initiate civil actions under subsection (a) (6) of this section shall be the exclusive civil remedy for the enforcement of the provisions of this Act." And this Court has recognized that: the Commission, which has "primary jurisdiction" with respect to civil enforcement, § 437c(b), has the sole discretionary power "to determine" whether or not a civil violation has occurred or is about to occur, and consequently whether or not informal or judicial remedies will be pursued. *Buckley* v. *Valeo*, 424 U.S. 1, 112 n.153 (1976).

and provide such person 15 days to demonstrate that no action should be taken on the basis of the complaint. 2 U.S.C. § 437g(a)(1). Only if the Commission then votes to find "reason to believe" a violation has occurred, may it proceed to an investigation of such alleged violation. 2 U.S.C. § 437g(a)(2).

The Commission is uniquely structured. Composed of six voting members, 2 U.S.C. § 437c(a)(1), the Commission does not itself adjudicate whether or not a violation has occurred. Rather, the Commission is authorized to vote initially on whether there is "reason to believe" a violation has occurred. Following an investigation, the Commission determines if there is "probable cause to believe" and attempts to reach an informal conciliation agreement with respondents. Only if conciliation fails, may the Commission seek adjudication in court. 2 U.S.C. § 437g(a)(6)(A).

To make the necessary judgment of whether the Commission should invoke its investigative and prosecutorial authority, Congress has placed reliance on the experience and expertise of the six voting members of the Commission, no more than three of whom may be of the same political party. Pursuant to 2 U.S.C. §§ 437c(c) and 437g(a)(2), (4)(A)(i), (6)(A), there must be four affirmative votes to find "reason to believe" and investigate or to find "probable cause to believe" or to initiate a civil suit. The Commission may dismiss complaints either by an affirmative vote by four of the six voting members or by failing to provide the four votes necessary to continue an enforcement matter. Once a matter is dismissed, the Commission is required to notify the

parties and to put the file on the public record. 2 U.S.C. § 437g(a)(4)(A)(ii), 11 CFR § 111.20.[3]

When the Commission dismisses a complaint, aggrieved complainants may seek a judicial determination that the dismissal was contrary to law. 2 U.S.C. § 437g(a)(8).[4] A court reviewing a Commission determination to dismiss an administrative complaint should reverse that determination only if it is found "arbitrary or capricious or otherwise contrary to law." *Buckley* v. *Valeo,* 424 U.S. at 113 n.154, 5 U.S.C. § 701.[5]

Moreover, a dismissal is deemed not arbitrary or capricious if the reviewing court finds a rational and defensible basis for the dismissal based upon the ad-

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[3] The United States Court of Appeals for the District of Columbia Circuit has previously held that the General Counsel's Report to the Commission is sufficient to support the Commission's dismissal of an administrative complaint. *Hampton* v. *Federal Election Commission*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9036 at 50, 439–40 (D.D.C. 1977), *aff'd* No. 77–1546 (D.C. Cir. July 21, 1978) (unpublished opinion). *See also Brown v. Federal Election Commission*, No. 79–0940 (D.D.C. July 17, 1980); *In re Federal Election Campaign Act Litigation*, 474 F. Supp. 1044, 1046 (D.D.C. 1979). *Accord, National Conservative Political Action Committee* v. *Federal Election Commission*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9057 (D.D.C. 1978), *aff'd as modified on other grounds*, 626 F. 2d 953, 956 n.7 (D.C. Cir. 1980), *citing Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), and *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

[4] *See Statutes Involved, supra* at 2, for the text of 2 U.S.C. § 437(g)(a)(8).

[5] The "arbitrary and capricious" standard has been recognized as the appropriate mode of reviewing Commission determinations. *See In re Carter-Mondale Reelection Committee, Inc.* v. *Federal Election Commission*, Nos. 80–1841, 80–1842 (D.C. Cir. Sept. 12, 1980). *See also* cases cited, *supra* at note 3; *Gelman* v. *Federal Election Commission*, No. 80–1646 (D.C. Cir. July 14, 1980), slip op. at 10.

ministrative record, *i.e.*, the factual and legal material before the Commission when it voted to dismiss the complaint. The record in this case demonstrates that the Commission adhered to the construction of 2 U.S.C. § 441a(d)(3) followed in two previous enforcement matters raising the precise issue herein MURs 780 and 820), App. A, *infra* at 17. The Commission's dismissal of MUR 1234 should be affirmed.

B. THE COMMISSION'S CONSTRUCTION OF 2 U.S.C. § 441A (D) (3) IS CONSISTENT WITH CONGRESSIONAL INTENT.

The Commission has consistently construed § 441a (d)(3) as not prohibiting state party committees from designating national party committees or national congressional campaign committees as agents for the purpose of making § 441a(d)(3) expenditures. The appellate court's departure from this consistent interpretation by the Commission of a statute within its jurisdiction is a matter so integral to the Commission's exclusive enforcement authority that it should be reversed by the Supreme Court.[6]

As Judge Wilkey noted in his dissent to the majority opinion below:

> [d]eference to the Commission's view on election law policy and what constitutes compliance seem particularly advised in that events occur very

[6] Under the appellate court's construction of 2 U.S.C. § 441a(d)(3), a violation of FECA would not occur if a national committee of a political party transfers monies to be spent by a state committee of that political party pursuant to 2 U.S.C. § 441a(d)(3). *See* 2 U.S.C. § 441a(a)(4), *supra*. However, if the state committee requests that the national committee spend those same monies on its behalf, FECA has been violated. This would not appear to be the only reasonable interpretation of the provisions at issue.

> quickly in an election year. The Commission is the expert body charged by Congress with the coherent administration of elections and must, therefore, be competent to reach expeditious and equitable judgments drawing reason out of a melange of vaguely consistent election laws obviously adopted by the process of political compromise on this highly charged political field; it is the Commission which is prepared to read the body of election law as a whole. Moreover, the Commission is self-consciously bipartisan. Congress created a Commission, 2 U.S.C. § 437c (1976), which could make sensitive political decisions cognizant of bipartisan exigencies. Courts should tread lightly on these matters of party politics.

Dissent at n.2, App. C. at 47; and

> * * * the Federal Election Commission, charged with implementing and enforcing the campaign laws, has very wisely and sensibly said, from the start and consistently thereafter, that the practice of designating another committee as an agent and authorizing expenditures of funds by the agent, when the funds could have been directly transferred anyway, is the equivalent of the transfers specifically authorized by the statute.

Dissent at 16, App. C at 63.

The appellate court's rejection of the Commission's construction of § 441a(d)(3), frustrates congressional intent to establish the Commission as the agency with the expertise to construe the statute

within its jurisdiction. Again, as Judge Wilkey recognized in his dissent to the majority opinion below:

> the issue before us is not our construction of the statute *de novo,* but whether the Commission's interpretation of the statute can be supported on a rational basis so that its conclusion cannot be said to be "contrary to law."

Dissent at 1, App. C at 46. The court of appeals erred when it reversed the district court's decision and concluded *de novo,* on an expedited appeal, that the Commission acted contrary to law by dismissing the complaint filed by DSCC in MUR 1234. The proper role of agency agreements within § 441a(d)(3) was fully briefed in written submissions to the Commission by both DSCC and NRSC and was resolved by the Commission after thorough consideration. The Commission's resolution should not have been reversed by the court of appeals.

II. THE DECISION OF THE COURT OF APPEALS IS INCONSISTENT WITH PRIOR DECISIONS IN THE DISTRICT OF COLUMBIA CIRCUIT

The decision of the court of appeals in this case conflicts with all previous actions wherein the United States Court of Appeals for the District of Columbia Circuit or the United States District Court for the District of Columbia reviewed Commission determinations to dismiss administrative complaints.[7] Stating that "we deal in this case, not with a discre-

[7] Because all § 437g(a)(8) actions must be brought in the United States District Court for the District of Columbia, there is no conflict among circuits with regard to the standard of review of Commission actions.

tionary exercise of Commission power, but with an interpretation of a federal statute," slip op. at 5, App. C at 33, the court below held that the Commission's determination was not entitled to any deference whatsoever because of a perceived lack of consistency with earlier Commission actions. Slip op. at 6 App. C at 34.[8] In adopting this position, the court ignored, by not attempting to distinguish, cases which have firmly established that Commission determinations should be accorded great deference requiring reversal only if arbitrary or capricious. *See Hampton* v. *Federal Election Commission, supra,* at 50, 440 ("the only question before the court is whether the statement of reasons provided in the General Counsel's Report sufficiently demonstrates that the FEC did not act arbitrarily and capriciously."); *In re Federal Election Campaign Act Litigation, supra,* at 1046 ("The sensitive nature of the Commission's decision certainly calls for judicial deference to the expertise of the agency which Congress has empowered to enforce the election laws. By reversing only those decisions which are arbitrary or capricious, the court provides this deference"); *Brown* v. *Federal Election Commission,*

[8] The court ignored the fact that the Commission's determination was one not to proceed with an administrative investigation. *See Buckley v. Valeo*, 424 U.S. at 112 n.153. Moreover, the Commission reached three consistent results. In three successive administrative enforcement proceedings, MURs 780, 820, 1234, App. A, *infra* at 17, the Commission found no reason to believe that FECA had been violated when NRSC acted as the agent for various state Republican Party committees in making expenditures pursuant to 2 U.S.C. § 441a(d)(3).

supra, at 2 ("* * * the question raised in [§ 437g(a)(8)] cases is whether, in light of all the evidence available to the Commission, the decision was arbitrary and capricious.").

Moreover, the court's decision disregards precedent in the D.C. circuit for deferring to an agency's construction of its own statute. *See Alexander* v. *Federal Energy Regulatory Commission*, 609 F. 2d 543, 548 (D.C. Cir. 1979) ("There is room, in review of administrative agencies, for some deference to their views even on matters of law * * * as on the meaning of statutes * * *"); *District of Columbia* v. *Payne*, 374 F. 2d 261 (D.C. Cir. 1966) ("[W]here the language of a statute is ambiguous and susceptible of two reasonable constructions, a long and unvarying administrative practice does have a very persuasive influence"). The Commission had consistently given § 441a(d)(3) the reasonable construction outlined, *supra*. The court of appeals substituted its own construction, contrary to the Commission's. The court committed clear error and its judgment should be reversed.

III. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH APPLICABLE DECISIONS OF THE COURT

The cases from this Court chiefly relied upon by the court of appeals for withholding any deference to the Commission's action stand only for the proposition that administrative actions initially command great deference from a reviewing court but that, given certain facts and circumstances, deference, while still applicable, is more limited. *See e.g., Gen-*

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eral Electric Company v. *Gilbert*, 429 U.S. 125, 141 (1976) (deference limited because the informal agency guideline at issue conflicted with prior agency rulings and because the agency involved had no statutory authority to promulgate regulations); *Espinoza* v. *Farah Manufacturing Company*, 414 U.S. 86, 94 (1973) (deference limited because the agency's guideline conflicted with Congressional intent).

Moreover, this Court has held:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application to this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings."

Udall v. *Tallman*, 380 U.S. 1, 16 (1965). The decision of the appellate court is a direct departure even from its own past application of Supreme Court cases in this area. Indeed, referring to a long line of United States Supreme Court decisions, the court of appeals had previously stated:

> [a]n administrative interpretation of a statute by an agency entrusted with its administration commands great deference in the courts. "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by [those] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'"

Bell v. *Brown*, 557 F. 2d. 849, 855 (D.C. Cir. 1977) (footnotes omitted), *quoting, American Horse Protection Association* v. *United States Department of Interior*, 551 F. 2d 432 (D.C. Cir. 1977).

In sum, the Commission regards the appellate court's approach as a serious deviation from established administrative law. While the Commission recognizes that a statutory provision will often be subject to different reasonable interpretations, it justifiably fears the consequences of the appellate court's failure to make the same recognition. The court's judgment should not be permitted to obtain in the absence of consideration by this Court.

CONCLUSION

The judgment of the United States Court of Appeals for the District of Columbia Circuit frustrates Congressional intent to establish the Federal Election Commission as the independent agency with exclusive jurisdiction to enforce the Federal Election Campaign Act, applies a construction of an important provision of FECA which is inconsistent with Congressional intent, and ignores precedent established by this Court and by the court of appeals. A writ should issue to review the judgment in this case.

Respectfully submitted,

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DECEMBER 10, 1980.

APPENDIX A

Before the Federal Election Commission

IN THE MATTER OF NATIONAL REPUBLICAN SENATORIAL COMMITTEE

MUR 1234

Certification

I, Marjorie W. Emmons, Secretary to the Federal Election Commission, do hereby certify that on July 10, 1980, the Commission decided by a vote of 6–0 to take the following actions regarding MUR 1234:

1. Find NO REASON TO BELIEVE that the National Republican Senatorial Committee violated the Act in making expenditures, under 2 U.S.C. § 441a(d)(3), as agent of both the Republican National Committee and of a Republican State Committee.
2. CLOSE THE FILE in this matter.
3. Send the letters of notification as attached to the First General Counsel's Report dated July 8, 1980.

Voting for this determination were Commissioners Aikens, Friedersdorf, Harris, McGarry, Reiche, and Tiernan.

Attest:

MARJORIE W. EMMONS,
Secretary to the Commission.

Dated: 7/11/80

Received in Office of the Commission Secretary: 7–8–80, 10:00.

Circulated on 48 hour vote basis: 7–8–80, 4:00.

Before the Federal Election Commission

IN THE MATTER OF NATIONAL REPUBLICAN SENATORIAL COMMITTEE

MUR 780

Certification

I, Marjorie W. Emmons, Secretary to the Federal Election Commission, do hereby certify that on January 19, 1979, the Commission determined by a vote of 5–0 to adopt the following recommendations, as set forth in the General Counsel's Report dated December 18, 1978, regarding the above-captioned matter.

1. Find no reason to believe that the National Republican Senatorial Committee violated 2 U.S.C. § 441a(d), as alleged in the complaint.
2. Close the file in this matter.
3. Authorize the sending of the letters attached to the above-named report.

Voting for this determination were Commissioners Springer, Aikens, Tiernan, McGarry, and Thomson.

Attest:

Dated: January 19, 1979.

MARJORIE W. EMMONS,
Secretary to the Commission.

Signed by General Counsel: January 12, 1979.

Received in Office of Commission Secretary: January 16, 1979, 1:20.

Circulated on 48 hour vote basis: January 16, 1979, 3:00.

Before the Federal Election Commission

IN THE MATTER OF NATIONAL REPUBLICAN SENATORIAL COMMITTEE

MUR 820 (78)

Certification

I, Marjorie W. Emmons, Secretary to the Federal Election Commission, certify that on June 14, 1979, the Commission, meeting in an executive session at which a quorum was present, took the following actions in the above-captioned matter:

1. Failed by a vote of 2–3 to pass a motion to amend Recommendation #3 of the General Counsel's June 6, 1979 report in MUR 820 (78) to read as follows:

> 3. Find reason to believe that the Republican National Committee and the National Republican Senatorial Committee may have violated 2 U.S.C. § 441a(h) by making contributions to James Martin of Alabama during the calendar year 1978 in excess of the limitations of that provision of the ACT.

Commissioners Harris and McGarry voted affirmatively for the motion. Commissioners Aikens, Friedersdorf, and Thomson dissented. Commissioner Tiernan abstained.

2. Determined by a vote of 6–0 to approve the General Counsel's recommendation to take no further action in connection with the National Republican Senatorial Committee (NRSC)'s possible violation of 2 U.S.C. § 441a(d) in connection with the Senatorial campaign of James Martin of Alabama.

3. Failed by a vote of 2–3 to pass a motion to adopt the General Counsel's recommendation to find reason to believe that the National Republican Senatorial Committee may have violated 2 U.S.C. § 434 by reporting expenditures made in connection with the Alabama

Senatorial primary, and made prior to the time NRSC was the designated agent of RNC, as coordinated expenditures under 2 U.S.C. § 441a(d), 11 C.F.R. § 110.7(a)(4).

Commissioners Harris and McGarry voted affirmatively for the motion.

Commissioners Aikens, Friedersdorf, and Thomson dissented.

Commissioner Tiernan abstained.

4. Failed by a vote of 2–3 to adopt the recommendation of the General Counsel to find reason to believe that the National Republican Senatorial Committee may have violated 2 U.S.C. § 441a(h) by making contributions to James Martin of Alabama during calendar year 1978 in excess of the limitations of that provision of the Act.

Commissioners Harris and McGarry voted affirmatively for the motion. Commissioners Aikens, Friedersdorf, and Thomson dissented. Commissioner Tiernan abstained.

5. Passed by a vote of 4–2 a motion to close the file in MUR 820 (78).

Commissioners Aikens, Friedersdorf, Thomson, and Tiernan voted affirmatively for the motion. Commissioners Harris and McGarry abstained.

Accordingly, the file has been closed on MUR 820 (78).

Attest:

Dated: June 15, 1979.

MARJORIE W. EMMONS,
Secretary to the Commission.

APPENDIX B

United States District Court for the District of Columbia

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, PETITIONER

v.

FEDERAL ELECTION COMMISSION, RESPONDENT

Civil Action No. 80–1903

Order

The Court, having fully considered the motion for summary judgment filed by petitioner Democratic Senatorial Campaign Committee and the cross-motion for summary judgment filed by respondent Federal Election Commission, and the Court having heard arguments by both sides, it is by the Court this 28th day of August 1980,

ORDERED that the motion of petitioner Democratic Senatorial Campaign Committee for summary judgment is denied; it is further

ORDERED that the motion of respondent Federal Election Commission for summary judgment is granted in accordance with the Memorandum Opinion filed herein this date; and it is further

ORDERED that this action is dismissed.

JUNE L. GREEN,
U.S. District Judge.

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United States District Court for the District of Columbia

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, PETITIONER

v.

FEDERAL ELECTION COMMISSION, RESPONDENT

Civil Action No. 80–1903

Memorandum Opinion

This is an action challenging the dismissal by the Federal Election Commission (the Commission) of a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended (2 U.S.C. § 431 *et seq.*), filed by the Democratic Senatorial Campaign Committee against the National Republican Senatorial Committee. Petitioner Democratic Senatorial Campaign Committee (DSCC) seeks a declaration by this Court pursuant to 2 U.S.C. § 437g(a)(8) that the Commission's determination was contrary to law and an order directing the Commission to comply with such declaration within 30 days.

The DSCC is a political committee organized by Democratic Party members specifically to support Democratic candidates in elections for the United States Senate. The National Republican Senatorial Committee (NSRC) is a political committee organized by Republican Party members specifically to support Republican candidates in elections for the United States Senate.

The administrative complaint involved was filed with the Commission by the DSCC on May 9, 1980, pursuant to 2 U.S.C. § 437g(a)(1). The allegations of the complaint concerned the practice of various state committees of the Republican Party authorizing the

NRSC to make expenditures which the state committees were entitled to make in connection with general election campaigns for the United States Senate under 2 U.S.C. § 441a(d). By written agreement, the various state committees had designated the NRSC as their "agent" in 1978 for the purpose of making such expenditures.

The complaint asserted that the NRSC was prohibited by the statute from acting as the agent of the various state Republican Party committees under 2 U.S.C. § 441a(d).

DSCC did not challenge the fact that the NRSC had been designated as the agent of the national committee of the Republican Party in making § 441a(d) expenditures on behalf of Republican senatorial candidates. Rather, it challenged only the ability of the state committees to designate NRSC as their agent in making § 441a(d) expenditures. The matter had been considered and rejected by the Commission in two previous cases; i.e., *Friends of Donald Stewart Committee* v. *NRSC,* MUR 820, and *National Committee for an Effective Congress* v. *NRSC,* MUR 780.

Pursuant to 2 U.S.C. § 437g, the Commission, which is vested with exclusive jurisdiction for administration and civil enforcement of the Act, *see* 2 U.S.C. §§ 437c(b)(1), 437d(e), gave the NRSC an opportunity to demonstrate that no action should be taken against it by the Commission. NRSC submitted a written response to DSCC's complaint.

On July 11, 1980, the Commission adopted the recommendation of its General Counsel and determined by a 6–0 vote that there was no reason to believe the NRSC had violated the Act. Accordingly, it dismissed the complaint, closed its file in the matter, and so notified complainant DSCC.

Thereafter, on July 30, 1980, DSCC filed a complaint in this Court seeking to have the Commission's

determination declared contrary to law. The following day, July 31, 1980, DSCC filed a motion for summary judgment. On August 18, 1980, FEC filed a cross-motion for summary judgment.

As the following discussion will show, there are no genuine issues as to any material facts in this action, and the Commission's action in dismissing petitioner's administrative complaint was not contrary to law. Accordingly, the Commission's cross-motion for summary judgment is granted, and petitioner's motion for summary judgment is denied.

DSCC's principal complaint is that under the agency arrangement engaged in between NRSC and State, when the State has insufficient funds to come up with its two cents per voting age population of the State, the NRSC makes up the difference up to a maximum of four cents: two cents per voting age population through its agency agreement with the National Committee plus two cents per voting age population pursuant to agency agreement with the State committee (plus the $17,500 allowable contribution to a senatorial candidate).

The FEC relied upon 2 U.S.C. § 441a(a)(4) which provides:

> The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district or local committees (including any subordinate committee thereof) of the same political party.

The FEC reasons that this provision authorizes the transfers challenged herein. In the FEC's view, it permits expenditures by the NRSC on behalf of the State committees subject to the express limitation on State committee spending contained in § 441a(d)(3).

In the instant case, the Court finds its scope of review to be a narrow one. It is well settled that courts must accord great deference to the agency below in

its administration of the statute with which the agency is charged. *Bell* v. *Brown,* 181 U.S. App. D.C. 226; 557 F. 2d 849 (1977).

Absent a finding that the FEC's determination was arbitrary, capricious, and abuse of discretion or otherwise not in accordance with law, its determination must be affirmed. *Hampton* v. *Federal Election Commission,* [1980] Fed. Elec. Cap. Fin. Guide (CCH) ¶ 9036 at 50, 439–40 (D.D.C. 1977), *aff'd,* No. 77–1546 (D.D. Cir. July 21, 1978) (unpublished opinion). *In re Federal Election Campaign Act Litigation,* 434 F. Supp. 1044, 1046 (D.D.C. 1979). The Court is unable to so find, and the decision below must remain undisturbed. Accordingly, petitioner's motion for summary judgment is denied, respondent's motion for summary judgment is granted, an appropriate order is entered herewith, and this action is dismissed.

JUNE L. GREEN,
U.S. District Judge.

Dated: August 28, 1980.

APPENDIX C

United States Court of Appeals for the District of Columbia Circuit

No. 80-2074

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
APPELLANT

v.

FEDERAL ELECTION COMMISSION
NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
INTERVENOR

Appeal from the United States District Court for the District of Columbia (D.C. Civil Action No. 80-01903)

Argued September 23, 1980
Decided October 9, 1980

Robert F. Bauer, with whom *William E. McDaniels, John J. Buckley,* and *F. Whitten Peters* were on the brief, for appellant.

Kathleen Imig Perkins, Assistant General Counsel, Federal Election Commission, with whom *Charles N. Steele,* General Counsel, Federal Election Commission, was on the brief, for appellee.

James F. Schoener for intervenor.

Before WRIGHT, *Chief Judge,* and WILKEY and GINSBURG, *Circuit Judges.*

Opinion for the court *per curiam.*

Dissenting opinion filed by *Circuit Judge* WILKEY.

PER CURIAM: This case calls for construction of the Federal Election Campaign Act of 1971 (FECA) and its 1974 and 1976 Amendments, 2 U.S.C. § 431 *et seq.*[1] Under a provision of the Act that permits the State committees of the political parties to make expenditures on behalf of senatorial candidates,[2] a number of Republican State committees have executed agreements by which they purport to designate the National Republican Senatorial Committee (NRSC) as their agent for purposes of making expenditures up to the legal limits. The Democratic Senatorial Campaign Committee (DSCC) has challenged this practice as contrary to the letter and purpose of the applicable statutory provisions. The DSCC first sought relief by filing a complaint with the Federal Election Commission (FEC), which upheld the legality of the "agency" agreements.[3] Assuming that it must sustain Commission decisions not shown to be arbitrary and capricious, the District Court granted the FEC's motion for summary judgment.[4] Because we believe that both the FEC and the District Court misconstrued the applicable law, we reverse.

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[1] The Federal Election Campaign Act (FECA) of 1971, Pub. L. No. 92-225, 86 Stat. 3, was amended by the FECA Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, by the FECA Amendments of 1976, Pub. L. No. 95-216, 91 Stat. 1655, and by the FECA Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339. The relevant provisions of the Act are hereinafter cited to the United States Code only; section references are all to Title 2.

[2] 2 U.S.C. § 441a(d)(3). The section also authorizes expenditures on behalf of House candidates.

[3] The Commission decision in this case, which it designated as Matter Under Review (MUR) 1234, issued on July 10, 1980.

[4] The decision of the District Court, rendered August 28, 1980, is printed in the Joint Appendix (JA) at 157.

I. Factual and Procedural Background

A. Agency Agreements

The Federal Election Campaign Act, as amended imposes limitations on campaign contributions and expenditures by individuals and by various kinds of political committees. Section 441a(d)(3), the provision centrally at issue in this case, provides for campaign spending by State and national committees of the political parties:

> (3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate * * * which exceeds—
>
> * * * * *
>
> (i) 2 cents multiplied by the voting age population of the State * * *.

Although phrased in restrictive terms, Section 441a-(d)(3) is in fact a grant of permission: It permits the national and State committees to make expenditures that would otherwise be prohibited.[5]

As it has done in each campaign since 1976, the Republican National Committee has designated the NRSC as its agent, authorized to make the expenditures permitted to the national committee by Section 441a(d) in all senatorial elections.

Various State committees of the Republican Party have also designated the NRSC as their agent under Section 441a(d). As in the case of the national com-

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[5] *See* brief for appellee alt 10 n.5 ("Absent § 441a(d), party committees could make no expenditures whatsoever in connection with the Congressional campaigns of their party's candidates.").

mittee, their agency agreements purport to transfer to the NRSC spending authority conferred under Section 441(a)(3).[6] In the 1978 senatorial elections during which the State committees commissioned the NRSC as their agent for the first time, the NRSC spent a total of $2,770,995 under the combined spending authority of the national and State party committees.[7] Most of the money went into 12 closely contested races, in which the NRSC spent $2,180,499. Of this sum, $1,106,286.60 was attributable to its expenditures as agent for the national committee, the remaining $1,074,213.40 to expenditures as agent of various State committees.

Agency agreements related to 1980 contests purport to authorize the NRSC to spend even larger sums. There are Senate races in 34 States, whose 34 Republican State committees have a composite spending spending ceiling of $3,487,020.08 under Section 441 a(d)(3).[8] A number of these State committees have designated the NRSC as their authorized spending agent. In California alone, the NRSC will be able to spend up to $485,024 as the agent of the State committee, and a total of $970,048 in its capacity as duel agent of the State and national committees. In New York the comparable figures are $379,717.12 and $759,434.24.

B. Proceedings Before the Federal Election Commission

On May 9 of this year the Democratic Senatorial Campaign Committee filed a complaint with the

[6] A sample "agency" agreement, pursuant to which the Alabama Republican Executive Committee designated the National Republican Senatorial Committee (NRSC) as its agent for making the senatorial campaign expenditures authorized by § 441a (d)(3), appears as Appendix B to the brief for intervenor NRSC.

[7] JA 105.

[8] JA 106.

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Federal Election Commission in which it challenged the legality of the agency agreements entered by the NRSC and the various Republican State committees.[9] In its accompanying memorandum of law,[10] the DSCC argued that the challenged arrangements violate the plain meaning of Section 441a(d)(3), which provides separate spending limits for State and national party committees and makes no reference to agency. The DSCC claimed that a clear purpose of the statutory scheme was to create an incentive to the development of vigorous State party organizations. The DSCC did not challenge the agency agreement between the NRSC and the Republican National Committee, since the FEC at that time interpreted a Commission regulation, 11 C.F.R. § 110.7, to authorize such agreements.[11] Moreover, the DSCC itself has made an agency agreement with the Democratic National Committee.

The Commission dismissed the complaint. Although it gave no reasoned explanation of its decision, the FEC acted after receipt of a report from its General Counsel.[12] The "First General Counsel's Report" stated that this was the third time that a complaint of this kind had come before the Commission. Although it recommended the same result that the FEC

[9] The complaint is reprinted at JA 1–9.

[10] Reprinted at JA 19–28.

[11] In fact, the regulation authorizes agency agreements only in presidential campaigns. The FEC has since conceded its interpretative error. *See infra.*

[12] First General Counsel's Report, July 8, 1980, reprinted at JA 46–57.

had reached in the prior cases,[13] the report suggested that the General Counsel's emphasis shifted over the course of the various proceedings.[14] In the first proceeding the General Counsel had attributed importance to the absence of any express statutory prohibition of agency arrangements. In this case, however, the General Counsel placed greater reliance on an inference of congressional intent apparently drawn from a related section of the Federal Election Campaign Act, Section 441a(a)(4). That provision allows for unlimited transfers of money between and among political committees of the same party, as defined by the statute.[15] Assuming that the NRSC was a committee of the Republican Party within the meaning of Section 441a(a)(4), the General Counsel reasoned

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[13] The FEC had decided the prior cases, designated MUR 780 and MUR 820, in response to complaints about NRSC spending pursuant to "agency" agreements during the 1978 campaigns. The decision in MUR 780 came in response to a complaint by the National Committee for an Effective Congress concerning expenditures during the Montana senatorial campaign of Larry Williams; the FEC apparently acted *sua sponte* in initiating the MUR 820 inquiry into the financing of the senatorial campaign of James Martin of Alabama. The Commission did not come to a decision on either MUR 780 or MUR 820 until after the election. *See also infra.*

[14] First General Counsel's Report, *supra* note 12, at 4–5, JA 49–50.

[15] Section 441a(a)(4) provides in pertinent part: "The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party. * * *"

that, because the NRSC could lawfully transfer money to the State committees, which the State committees could then spend up to a limit of 2 cents per resident of voting age, the statue must have intended that the NRSC could itself make expenditures up to that limit while acting as the agent of the State committees.[16] The General Counsel also cited the more general argument that the provision permitting expenditures by the State and national party committees was intended to be "broad"—broad enough to permit the pooling of large numbers of small contributions made to the political parties and their various committees. After receiving the General Counsel's report on July 8, the Commission rendered its judgment on July 10.[17] By a vote of 6–0 it found "no reason to believe" that the NRSC's agency agreements with the State committees violated Section 441a(d)(3). The FEC's summary announcement of the decision did not explicitly adopt the report of the General Counsel.[18]

C. Proceedings Before the District Court

The DSCC sought District Court review of the FEC's action.[19] Its petition, filed July 30, 1980, requested a declaratory judgment that the FEC's decision was "contrary to law," on the theory that Section 441a(d)(3) precludes the State committees from assigning their spending limits to the NRSC. Ruling on cross-motions for summary judgment, the District Court decided in favor of the FEC on

[16] *See* First General Counsel's Report, *supra* note 12, at 5, JA 50 (quoting MUR 820) and 8, JA 53.

[17] JA 58.

[18] *See id.* The failure to incorporate the First General Counsel's Report was in accord with usual FEC procedure. *See infra.*

[19] Jurisdiction for review in the District Court is provided by 2 U.S.C. § 437g(a)(8). The District Court summarily denied a motion to intervene filed by the NRSC.

August 28. The court held that the FEC must prevail unless its action was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."[20] Judge June Green found no violation of that standard. The District Court construed the decision of the FEC as resting on the inference, advanced by the General Counsel, that the transfer of funds provision of Section 441a(a)(4), when read in conjunction with Section 441a(d)(3), revealed a congressional willingness to treat the funds and expenditures of various party committees, including the NRSC, as essentially interchangeable.[21] The DSCC docketed an appeal in this court on September 4, 1980. The NRSC moved to intervene on September 19, and the court agreed to the intervention.

II. Standard of Review

The District Court regarded the decision of the FEC as entitled to extreme deference. We approach the matter differently.

Although a court should undertake only "a very limited review of the exercise of the FEC's discretionary decisions," *In re Carter-Mondale Reelection Committee, Inc.*, —— F. 2d ——, —— (D.C. Cir. No. 80-1841, decided September 12, 1980) (slip opinion at 15), we deal in this case not with a discretionary exercise of Commission power, but with an interpretation of a federal statute. The Supreme Court has long recognized that "the courts are the final authorities on issues of statutory construction" and need not "rubber-stamp" administrative decisions that misinterpret a federal statute. *SEC* v. *Sloan*, 436 U.S. 103, 118 (1978) (*quoting Volkswagenwerk* v. *FMC*, 390

[20] *Democratic Senatorial Campaign Committee* v. *FEC*, D.D.C. Civil Action No. 80-1903, Aug. 28, 1980, memorandum opinion at 3, JA 159.

[21] *Id.*

U.S. 261, 272 (1968), and *NLRB* v. *Brown*, 380 U.S. 278, 291 (1965)).

We recognize that special deference to an agency's interpretation of its governing statute is often appropriate. *Cf. Gelman* v. *FEC*, —— F. 2d ——, —— (D.C. Cir. No. 80–1646, decided July 18, 1980) (slip opinion at 9). But the Supreme Court has established that an agency's entitlement to deference depends upon the quality of its determinations.[22] Factors to be considered include " 'the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements.' " *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 287 n.5 (1978) (*quoting Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)). Measured against this standard, the Commission's performance in the matter before us fails to merit the court's substantial deference.

First, the Commission has presented no reasoned explanation of its decision. It merely pronounced that it found "no reason to believe" that the NRSC violated the Act in making expenditures as agent of the national and State committees.[23] We are not even

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[22] *Compare Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433–434 (1971), *with Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 92–96 (1973), *and General Electric Co.* v. *Gilbert*, 429 U.S. 125, 140–143 (1976).

[23] This bare pronouncement reflects consistent Commission practice. After concluding a case the FEC places the relevant documents, including staff reports and recommendations, in a public file. The Commission does not endorse the reasoning of its staff, nor does it offer reasons of its own. *See* Note, *The Federal Election Commission: The First Amendment and Due Process*, 89 Yale L. J. 1199, 1211–1212 (1980).

Failure to adhere to accepted standards of reasoned decision-making not only undermines public confidence but may actually impair the substantive quality of the Commission's performance. *See id.* at 1211. It also deprives a reviewing court of any Commission record on which to base a deferential consideration.

certain whether the Commission endorsed the reasoning of its General Counsel, since the Commission's decision did not explicitly adopt the General Counsel's report and the Commission's own newsletter, the *FEC Record,* has avowed that Commission actions "are not necessarily based on, or in agreement with, the General Counsel's analysis." [24]

Second, even if we were to accept the analysis of the General Counsel as that of the Commission, we would still encounter a troubling absence of consistent reasoning. On two prior occassions, the first January 19, 1979 and the second June 17, 1979, the FEC upheld the legality of NRSC-State committee agency agreements. In those cases, as in the case at bar, the FEC file apparently included a General Counsel's report recommending approval of the challenged agreements.[25] From report to report, Counsel's grounds for his recommendation shifted perceptibly.

In the first case, the General Counsel rested on the absence from the text of Section 441a(d)(3) of an explicit prohibition of agency agreements and on a reading of Section 441a(a)(4) that would permit unlimited transfers of funds from NRSC to the State committees. *See* First General Counsel's Report, *supra,* at 4, JA 49.

In the second proceeding he added a new justification, arguing that a recently promulgated regulation, 11 C.F.R. § 110.7, permitted the national committee of a political party to designate any agent for the purpose of making Section 441a(d)(3) expenditures. Because the goal of that regulation was to promote coordination among party committees, the Counsel reasoned that the State committees should also be

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[24] *FEC Record*, Oct. 1979, at 4.

[25] The FEC has not supplied copies of those reports. The First General Counsel's Report in the present case, however, refers back to the earlier reports.

permitted to designate spending agents under Section 441a(d)(3). *See* First General Counsel's Report, *supra,* at 5, JA 50.

The present litigation has evidenced three more changes in the position of either the General Counsel or the Commission. First, and most important, the Commission brief in this court disavowed the heavy reliance that the General Counsel once placed on a provision of 11 C.F.R. § 110.7. *See* brief for appellee at 9–12. Because the section relied upon, Section 110.7 (a)(4), authorizes agents only in connection with presidential campaigns, not congressional contests, the FEC has now conceded that prior citations to the section to sustain the designation of agents in Senate races seriously misconstrued the regulation. Nonetheless, the misconstruction appeared in the First General Counsel's Report made public at the time of the Commission's decision in this case.

In the second significant change, the General Counsel retreated from any substantial reliance on the absence of an express agency prohibition in the text of Section 441a(d)(3). First General Counsel's Report, *supra,* at 4, JA 49. Third, and finally, the General Counsel's report presented a new argument to justify the legality of agency agreements. Once again relying primarily on Section 441(a)(4), the Counsel appended the corollary claim that congressional failure to amend that section to prohibit transfers of funds by the NRSC constitutes implicit ratification of the Commission's position. *Id.* at 8–11, JA 53–56.

These alterations in grounds for the agency's decision do not warrant our rejection of any individual argument proffered by the General Counsel or the Commission. We are prepared to consider each,

in its turn. But the Counsel's shifting positions offer no adequate support for a claim that the Commission's position here is a product of thorough consideration, careful deliberation, and secure judgment. We must decide for ourselves whether the action of the Commission was "contrary to law."[26]

III. Expenditure Limitations Under Section 441a(d)(3)

The agency agreements executed by the Republican State committees and the NRSC purport to transfer spending authority conferred by Section 441a(d)(3). Our inquiry into the permissibility of such agree-

[26] The dissent makes two distinct points concerning the respect the Commission's decision should command. First, the Commission is entitled to deference in construing its own statute. *See* dissenting op. at 1. Second, the court should refrain from upsetting an arrangement supported by "precedent established over the lifetime of the practice." *Id.* at 10. The dissent does not weight, indeed it does not mention, the failure of the FEC to provide a consistent, reasoned explanation of the position it has taken. Moreover, the dissent's reliance on "established" precedent hangs by a slender thread. Commission decisions relevant to this case are of recent vintage. Judge Wilkey recites Commission precedent in four numbered paragraphs. *See* dissenting op. at 10–11. Only one of the recitations is squarely in point. The first three paragraphs relate to Commission expressions on delegations by the *national* rather than the State committees. The fourth paragraph invokes the FEC decisions in MURs 780 and 820, the only precedents directly on target. But neither of these matters was decided until 1979. Prior to the District Court opinion in this case, *no* judicial precedent existed. When Congress expressly provides litigants with a right of judicial review, it is not open to the court to shirk its responsibility by invoking an intervenor's reliance on a short course of unreviewed agency actions.

ments begins with examination of the statute itself.[37] Accepted principles of construction establish the presumption that the terms of statutes are ordinarily intended to carry their plain meaning. *See SEC* v. *Sloan, supra; Caminetti* v. *United States,* 242 U.S. 470 (1917); *March* v. *United States,* 506 . 2d 1306 (D.C. Cir. 1974).

The relevant language of Section 441a(d)(3) authorizes "the national committee of a political party, or a State committee of a political party, including any subordinate State committee," to make "any expenditure" of up to 2 cents per voting-age resident on behalf of the party's senatorial candidate. The operative terms are plain and precise. There is no suggestion that Congress chose its language loosely. Section 441a(d)(3) not only designates spending limits with mathematical rigor; it also confers authority to reach those limits on two named committees, both clearly identified by statutory definitions. Section 431 (14) defines the "national committee" as "the organization which, by virtue of the by-laws of a political party, is responsible for the day-to-day operation of such political party at the national level." Section 431 (15) defines a "State committee" as "the organization which, by virtue of the by-laws of a political party, is

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[37] Intervenor NRSC appears to believe that we are not entitled to reach this question, being bound instead to hold for the FEC under principles of *res judicata* and collateral estoppel which NRSC contends forbid our hearing the case. *See* brief for intervenor at 10. We are of the view that claim and issue preclusion principles are inapplicable to the present case. Where, as here, the statute provides for judicial review, an agency's decision on a question of law does not control the judgment of an Article III court. *See* Restatement (Second) of Judgments § 131, comments a and d, at 32–33, 39 (Tent. Draft No. 7 1980) ("[An] agency determination is no more res judicata in [a judicial] review proceeding than is a trial court judgment res judicata in an appellate court in which it is under appeal.").

responsible for the day-to-day operation of such political party at the State level."

It is obvious that the NRSC is neither the "national" nor a "State" committee of the Republican Party within the contemplation of Section 441a(d)(3). Nor do we understand either the FEC or the NRSC to contend that the NRSC qualifies as a "subordinate committee of a State committee," the third kind of committee to which Section 441a(d)(3) refers. Nor, finally, does the statute make reference to any other kind of permissible arrangement by which the State party organizations might convey their spending authority to any other organization. The plain language of the statute thus seems to preclude any arrangement by which the special authority of a named entity is transferred to another.[28]

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[28] The dissent, like intervenor NRSC but unlike the FEC, argues that First Amendment rights of speech and association would be violatd if § 441a(d)(3) were construed to deny the capacity of State committees to assign their statutory authority to the NRSC. Reliance for this argument is placed on *Buckley* v. *Valeo*, 424 U.S. 1. (1976). That decision held unconstitutional limitations on independent expenditures by individuals and non-party associations in election campaigns. The Court addressed and upheld expense ceilings on national and State party committees only in the context of the Fifth Amendment challenge there made. 424 U.S. at 58–59 nn. 66, 67. But as the FEC notes, brief for appellee at 10 n. 5, independent expenditures are not at issue here: "Party committees * * * are deemed incapable of making independent expenditures in connection with the campaigns of their party's candidates." *Cf.* 2 U.S.C. § 441(a)(7)(B)(i) (any expenditure made "in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be condsidered to be a contribution to such candidate.").

Nor do we understand NRSC to suggest in this case that it has made independent expenditures on behalf of candidates, expenditures of the kind the *Buckley* Court found to be constitutionally protected. And surely no frontal attack has been made by NRSC on the constitutionality *vel non* of expenditure limitations imposed on party organs.

In its brief as an intervenor in this court, NRSC urges the contrary inference. In so doing, it rehearses an argument invoked by the Commission's General Counsel in an earlier case, the same one on which the General Counsel no longer places substantial reliance. *See* First General Counsel's Report, *supra,* at 4, JA 49. According to the NRSC, this court should infer that agency agreements are permissible under Section 441a(d)(3) because the statutory text includes no express prohibition of agency relationships. The NRSC's argument depends for its plausibility on its use of "agency" terminology. The language of Section 441a(d)(3) presumably does not prohibit a State political committee's employment of an agent in the standard legal sense; the failure of the statute to mention agency does not, for example, mean that the State committees may not hire staff authorized to act in their behalf. Against this background of familiar usage, however, it is somewhat misleading to characterize the challenged relationships between the State committees and the NRSC as ones of "agency." The State committees do not, in the role of principal, raise and transfer funds to the NRSC as agent; nor do they give any direction as to how "their" funds ought to be spent. Rather, the NRSC raises and spends money as it sees fit; the State committees interact with the NRSC only in the initial agreement to the arrangement. Thereafter the State committees serve as legal shells. We cannot believe that Congress intended the language of Section 441a(d)(3) to authorize artificial relationships of this kind.

We are buttressed in our reliance on the clear language of Section 441a(d)(3) both by the provision's statutory context and by legislative history. The NRSC and its parallel congressional campaign com-

mittees were familiar to the Congress that adopted Section 441a(d)(3). Indeed, Congress specifically provided for such committees in Section 441a(h), which permits "the Republican or Democratic Senatorial Campaign Committee, or the national committee of a political party, or any combination of such committees" to make direct contributions of up to $17,500 to senatorial candidates, "notwithstanding any other provision of this Act."[29] If Congress had similarly intended for the NRCS to share in the spending permissions of Section 441a(d)(3), it is not unreasonable to think that Congress would have said so explicitly, or at least signalled its intention in the course of its deliberations.

Yet the legislative history gives no hint that Congress ever foresaw, much less intended, that delegations of spending authority under Section 441a(d)(3) might be attempted. On the contrary, during the 1974 legislative debates Senator Brock noted with concern that the Act and its proposed Amendments failed to provide more permissive treatment to the congressional campaign committees.[30] Though he was fully aware of the proposed Section 441a(d)(3) permission for expenditures by the national and State committees—and in fact mentioned it during his remarks—

[29] Appellant Democratic Senatorial Campaign Committee argues that the language of § 441a(h) by its own force prohibits any "agency" agreements that lead to NRSC expenditures of more than $17,500 in any single Senate race. *See* brief for appellant at 18–20. In its view, § 441a(h) exhibits clear congressional intent to limit NRSC expenditures to this amount. Because we rest our holding on the plain language of § 441a(d)(3) itself, we need not decide whether § 441a(h) implies a limitation on § 441a(d)(3) or any other provision of the Act.

[30] 120 Cong. Rec. S5189–S5191 (daily ed. Apr. 3, 1974).

Senator Brock proposed a further amendment that would have exempted congressional campaign committees like the NRSC from the Act's expenditure limits. "I offer this amendment," he said, "because I do not believe that as the bill is written [the congressional campaign committees] could literally operate in support of our candidates under the existing language." [31]

The Senate initially adopted the amendment offered by Senator Brock, but reversed itself five days later.[32] The record of the Senate debate leading to repeal of the Brock amendment is equally revealing. With the attention of the Senate again riveted on the status of the congressional campaign committees under the Federal Election Campaign Act, not a single Senator ever suggested that the NRSC or any similar committee might be able to assume the spending authority of the State committees. Moreover, the 1974 debates evidence a congressional distinction between the political parties, whose role in the political process Congress ought to strengthen, and the campaign committees of the House and Senate. Senator Clark, who led the fight to repeal the Brock amendment, spoke to this point explicitly. "No one," he said, "should confuse national political parties, supported as they are by thousands of people giving in $5 and $10 amounts, with the Senate and House Campaign Committees." [33]

Thus, no more in the legislative history than in the language of Section 441a(d)(3) do we find support

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[31] *Id.* at S5189.

[32] *Id.* at S5411–S5415 (daily ed. Apr. 8, 1974).

[33] *Id.* at S5411.

for the kind of transfer of statutory authority at issue in this case.[34]

IV. Relevance of the Transfer Provision

The FEC argues that since Section 441a(a)(4) permits the NRSC to transfer unlimited funds to the State committees, it would be "placing form over substance" to forbid the State committees to designate NRSC as their agent. Brief for appellee at 17. We do not address the question whether NRSC may freely

[34] Appellee purports to find evidence of congressional support for its construction of § 441a(d)(3) in the failure of Congress to enact legislation that would have prohibited explicitly any "movement of funds" between State political committees and congressional campaign committees such as the NRSC. *See* brief for appellee at 14–15. The evidence is entirely unpersuasive. First, postenactment legislative history has very limited utility in statutory construction, *see SEC* v. *Sloan*, 436 U.S. 103, 120–122 (1978), and in no case could it change the intent of the Congress that passed the statute. *See Regional Rail Reorganization Cases*, 419 U.S. 102, 152 (1974). Second, the House never actually rejected the bill on which appellee relies, but instead refused to consider the measure on its merits. *See* 124 Cong. Rec. H2261–H2269 (daily ed., Mar. 21, 1978). Third, even within the bill the transfer provision was relatively minor; it is at best uncler that the vote to deny legislative consideration on the merits was motivated by opposition to any particular section. Fourth, the House debate and vote occurred before any FEC decision upholding the legality of agency agreements between State committees and the NRSC under § 441a(d)(3). Fifth, and most important, the proposed ban on the transfer of funds, even had it been adopted, would not speak directly to the issue in this case. Our question involves the legality of an arrangement by which a State committee purports to assign its statutory spending rights to the NRSC, not the legality of a fund transfer.

transfer funds to State committees under Section 441 a(a)(4), because that issue was not joined before this court. While not conceding the validity of such transfers,[35] DSCC does not now challenge transfers of funds from NRSC to the State committees, apparently because no such transfers have ever been made.

We are not convinced, however, that an outright transfer of funds from NRSC to a State committee would be equivalent to an "agency" relationship in which the agent, NRSC, controls the funds from start to finish—from raising to spending. In the latter situation the State committee may have no voice in the way funds are spent. Nor is this a difference that is obviously without consequence. When the NRSC pays the piper, it will call the tune. The candidate may have little incentive to communicate with the State committee, preferring to deal with a committee of his colleagues that directs the flow of funds.

If funds were actually transferred to the State committees, on the other hand, the committees would be more likely to maintain an active role throughout the campaign. Even if NRSC attempted to direct how transferred funds were to be spent, the State committees would actually make the day-to-day campaign expenditures and might be able to persuade NRSC that funds should be spent differently than the congressional committee envisioned. As State committees assumed responsibility for campaign disbursements,

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[35] We have some doubt about whether § 441a(a)(4) encompasses the congressional committees at all. In order to fall within that section the congressional committees would have to be either "national * * * committees * * * of [a] political party" or subordinate to such a committee. Section 431(14) defines "national committee" in a manner that the parties agree excludes congressional committees. We do not know whether the congressional committees could establish that they are subordinate to the national committees of their parties.

moreover, candidates might confer more closely with those committees and remain more closely in touch with their local party constituents. Since the structure of the Act suggests that Congress intended to increase the role of State and national committees, not of congressional committees, we find these possible differences to be potentially meaningful.[36]

It would be inappropriate for this court to speculate further about the ways in which transfers of funds might differ from agency agreements. The parties have not argued the validity of funds transfers, but only of agency agreements. Since we find that the plain language of Section 411a(d)(3) precludes the latter,[37] we must reverse the District Court, declare

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[36] The dissent argues that the same number of dollars will be raised by the NRSC and spent in the same State senatorial campaigns, regardless of whether the NRSC is permitted to act as the agent of the State committees, dissenting op. at 9, and that this factor is all that matters in terms of "substance." The dissent thus fails to consider the possible importance of State committee *control* of finances in strengthening the influence of the State committees and encouraging candidates to communicate more closely with their State party constituencies. Nor is the dissent even consistent in its claim that the court's decision exalts form over substance. Having argued at length that our opinion will not alter the "substance" of campaign finance, the dissent then proceeds to claim that the result will be more sweeping than even the plaintiffs had "bargained for." *Id.* at 8. The court, the dissent argues, should not upset a method of campaign financing that the NRSC has found to have "some functional advantage." *Id.* at 9. Yet the location of such a "functional advantage" in a senatorial campaign committee, rather than in the national or State committees, is a result that Congress showed no desire to achieve.

[37] Like the Commission, the dissent fails to come to grips with the only real issue in the case: may party organizations effectively rewrite § 441a(d)(3) of the Act to displace State committees and substitute congressional campaign committees in their stead? For the reasons stated in our opinion, the clear answer to this question is "no."

the Commission's failure to act contrary to law, and direct the Commission to conform with this decision forthwith. *See* U.S.C. § 437g(a)(8)(C).

So ordered.

WILKEY, Circuit Judge, dissenting: Like Chief Judge Wright and Judge Ginsburg, I too have read the statute and base my opinion as to the necessary result in this case on its plain language. Unlike my colleagues, however, I do not approach the task of this court as if we are the first called upon to construe this statute; the issue before us is not our construction of the statute *de novo,* but whether the Commission's interpretation of the statute can be supported on a rational basis so that its conclusion cannot be said to be "contrary to law."[1] Also unlike my colleagues, I

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[1] U.S.C. § 437g(a)(8)(C) (1976) and subsequent amendments. The statutory standard for judicial review requires the court to overturn a Commission interpretation of its implementing statute which is "contrary to law." *Id.* § 437g(a)(8)(C). The Federal Election Campaign Act delegates to the Commission especially broad discretion to set election law policy and to draw the meaningful distinctions appropriate to definitions under the election law. *E.g.*, 2 U.S.C. § 437c(b)(1), *as amended by* Pub. L. No. 96-187, § 306(b)(1), 93 Stat. 1335 (1979): "The Commission shall administer, seek to obtain compliance with, and *formulate policy* with respect to, this Act," (emphasis added); 2 U.S.C. § 431(14)-(15): "The[se] term[s] * * * mean[ ] * * *, *as determined by the Commission*" [emphasis added].

reach a result supported by the General Counsel of the Federal Election Commission, the unanimous 6 to 0 vote of the Members of the Commission, and the decision of the District Judge below.[2]

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[2] *Democratic Senatorial Campaign Committee* v. *FEC*, No. 80-1903 (D.D.C. 28 Aug. 1980).

The penchant of this court to give no deference whatsoever to the responsible agency's interpretation of its role and basic statute has been noted with acerbity by the Supreme Court in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978) and by commentators, *e.g.*, Scalia, "*Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*," 1978 S. Ct. Rev. 345, 358, 371. Deference to the Commission on new issues like this before a new agency gives the agency the chance it needs to make its own interpretation, because it has the responsibility to make its statute work. *Power Reactor* v. *Electricians*, 367 U.S. 396, 408 (1961). Deference to the Commission's view on election law policy and what constitutes compliance seems particularly advised in that events occur very quickly in an election year. The Commission is the expert body charged by Congress with the coherent administration of elections and must, therefore, be competent to reach expeditious and equitable judgments drawing reason out of a melange of vaguely consistent election laws obviously adopted by the process of political compromise on this highly charged political field; it is the Commission which is prepared to read the body of election law as a whole. Moreover, the Commission is self-consciously bipartisan. Congress created a Commission, 2 U.S.C. § 437c (1976), which could make sensitive political decisions cognizant of bipartisan exigencies. Courts should tread lightly on these matters of party politics.

I. Straight Statutory Construction

We start with 2 U.S.C., Ch. 14—Federal Election Campaigns [3], § 441a, *Limitations on Contributions and Expenditures.* There are *two* subsections—not just one—relevant and decisive in this case.

a. *Dollar limits on contributions.*

* * * * *

(4) The limitations on contributions contained in paragraphs (1) and (2) do apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party.

* * * * *

(d) *Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office.*

* * * * *

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State Committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

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[3] The Federal Election Campaign Act of 1971 (FECA), Pub. L. No. 92-225, 86 Stat. 3, was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. 93-443, 88 Stat. 1263, by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475, by the Social Security Amendments of 1977, Title V, Sec. 502, Pub. L. No. 95-216, 91 Stat. 1655, and by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339.

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner of any other State, $10,000.

The latter of the two above provisions, (d)(3), fulfills one of the two prime objectives of the Federal Election Campaign Act—to place a limit on overall expenditures in campaigns for federal office. For my colleagues this provision is sufficient unto itself to settle the question before us in this case. For me it is not sufficient, because this section alone does not purport to tell us where the money, whose total amount is limited, is coming from.[4] To find out that we must look back at the first part of § 441a *Limitations on Contributions and Expenditures,* to the very first subsection: (a) *Dollar limits on contributions.* Subsections (1), (2), and (3) deal with limits on contributions by persons, multi-candidate political committees, and individuals, provisions which are directed to the second principal objective of the FECA, *i.e.,* eliminating undue and corrupting political influence on candidates and office-holders by limiting contributions. The

[4] The majority, maj. op. at 12–16, appears to be singularly concerned with *who* may spend money under FECA rather than from *where* campaign money may lawfully flow. The transfer provision, 2 U.S.C. § 441a(a)(4), indicates strong legislative intent that campaign monies flow freely through a political party's extended network. Plainly, Congress thought to permit the discretionary assignment of funds among a party's component organizations.

subsections dealing with persons, multi-candidate political committees, and individuals are not relevant to this case, but subsection (a)(4), quoted above, certainly is.

Subsection (a)(4), far from placing any limitation, specifically provides that the prior limitations in (1) and (2) (persons and multi-candidate political committees) "do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party." As will be discussed more fully under IV below, while there are evils associated with large contributions by persons and multi-candidate political committees to candidates for federal office, there are no visible evils associated with the transfer of funds among committees of the same political parties. The contribution limitations as to the original sources have already been applied, and the connection between the recipient federal candidate and the original source of the funds is totally broken and obscure.[8]

So, looking again at subsection (d)(3), we might expect that the national committee of each political party, or a state committee of a political party, would gain a substantial amount of contributions from persons generally, and would employ those funds most efficiently to assist the candidates for Senator or Representative in each State as its judgment indicated—but within the overall limit on expenditures as provided by subsection (d)(3). However, in addition to the contributions of persons or other authorized entities, which are limited by §§ 441a(a)(1), (2), and (3), these party national and state committees have an additional source of funds, and that is a transfer of

[8] *See* notes 7–18, 25 *infra* & accompanying text. *See also Common Cause* v. *Schmitt*, Nos. 80-1609 & 80-1754 (D.D.C. 30 Sept. 1980) (three-judge court) at 18 & n. 40.

funds from one of the "political committees which are national, State, district, or local committees * * * of the same political party" under subsection (a)(4). These transfers are plainly unlimited in amount, because the funds have been accumulated in obedience to the contribution limits of § 441a(a) and there is no visible evil in the transfer of funds among political committees of the same party, if both the individual contribution limits and the overall expenditure limits on any campaign race are observed.

The Senatorial Campaign Committees and the Congressional Campaign Committees of each major political party have proved to be highly successful fundraisers. The plaintiff Democratic Senatorial Campaign Committee does not challenge in this suit that under § 441a(a)(4) either a Senatorial Campaign Committee or a Congressional Campaign Committee of either party *can transfer* an unlimited amount of money to either that party's national committee or that party's state committee in one of the individual states, and that the money so transferred can be expended on behalf of that party's candidate for either the Senate or the House in a given state—all within the expenditure limit of (d)(3).

However, for reasons which are not obvious in the record and which are immaterial, the Senatorial and Congressional Campaign Committees of *both* political parties have found it administratively advantageous to make the above-described transfer of funds in an indirect way.[6] Instead of the Senatorial or Congressional Campaign Committee writing its check to the order of the national committee of its party, the Senatorial or Congressional Campaign Committee of both parties has followed the practice of having the na-

[6] Counsel for appellant, Democratic Senatorial Campaign Committee, has informed the court that it too is the designated agent of its party's national committee.

tional committee *authorize* the Senatorial or Congressional Campaign Committee of its party to make expenditures *as its agent* on behalf of designated candidates for the Senate and the House. Again, such expenditures by a given national committee from all sources must be within the overall limits of subsection (d)(3).

Significantly, and interestingly, this indirect device of appointing the Senatorial or Congressional Campaign Committee as the agent of the *national* committee, a practice followed by both political parties, is *not* challenged by the plaintiff Democratic Senatorial Campaign Committee here. What is challenged is the exact parallel in direct transfer of funds by the authorization of a *state* committee to the Senatorial (or Congressional) Campaign Committee to expend funds on behalf of a designated candidate for the Senate or House of that political party.[1] This delegation of expenditure authority is practiced *only* by the *Republican* Senatorial and Congressional Campaign Committees, but *not* by the *Democratic*. Why this is so we do not know, and it is immaterial to any court decision, because the delegation of authority from the state committee to the Senatorial or Congressional Campaign Committees rests on precisely the same rationale and statutory provisions permitting unlimited transfers as does the delegation of authority from the national committee to the Senatorial or Congressional Campaign Committees, a practice engaged in by *both* political parties.

II. Form Over Substance

My colleagues say that we are not called upon here to pass upon a transfer case, that there is actually no

[1] *Cf.* Maj. op. at 17–19.

writing of a check by the National Republican Senatorial Committee to a state committee on behalf of a Senatorial candidate in that state. This is true. The transfer of funds and the transfer of their political effect do not take place in that way; it is done indirectly as described above by the delegation of authority from the state committee to the Senatorial Committee (or from the national committee, unchallenged here).

The difference is purely one of form, not substance. It makes absolutely no difference in the scheme of control of campaign expenditures and contributions whether the National Republican Senatorial Committee in Washington writes a check and mails it to the state committee in Louisville, Kentucky, to be expended for the benefit of the Republican nominee for the Senate in the State of Kentucky, or on the other hand, as is now the practice, the state committee in Louisville, Kentucky, writes a letter to the Senatorial Campaign Committee in Washington authorizing that committee to make expenditures on behalf of the same Republican nominee for the Senate in Kentucky. In either event, the funds expended come from the contributions accumulated by the Senatorial Committee in Washington, those contributions having been duly made in accordance with the limitations of § 441a(a), and expended within the overall limitations of § 441a(d)(3).

It is precisely because to accede to the view argued for by the plaintiff here and espoused by my colleagues would do nothing but exalt form over substance that the Federal Election Commission very sensibly responded in a requested opinion that such delegation of authorized expenditures to the Senatorial or Congressional Campaign Committee of the same party was lawful within the meaning and purpose of the statute.

The FEC stated: "Since funds may be transferred between the congressional campaign and the national committee of the same political party without limitation, it is immaterial as to which committee's funds are being expended under 2 U.S.C. § 441a(d)(3)."[8] There is simply no sense in prohibiting the letter of authorization being written in Louisville and mailed to Washington, when it is recognized that the statute plainly permits under § 441a(a)(4) a check to be written in Washington and mailed to Louisville to accomplish precisely the same purpose, *i.e.*, spending money accumulated by the National Republican Senatorial Committee on behalf of the Republican candidate for Senator in the State of Kentucky.[9]

According to the majority's view, two things will happen: First, the letters of authorization from the state committees to the National Republican Senatorial Committee will become of no effect and the Senatorial Committee in Washington will immediately start writing checks to each state committee for the amount which it has decided to allocate in support of the Republican Senatorial candidates in those states. Secondly—and this is more than the plaintiffs have asked or bargained for—*both the National Committees of the Republican and Democratic parties* will immediately be required to stop writing letters of authorization to their respective Senatorial and Congressional Campaign Committees in Washington; in-

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[8] Advisory Opinion, AO 1976–108, *reprinted in* Commission Appendix at 3a, *reprinted in* [1980] Fed. Elec. Camp. Fin. Guide (CCH) ¶5236.

[9] There is no question in this case of limitations on *contributions* under 2 U.S.C. § 441a(h) ($17,500 contribution limit imposed on national and Senatorial Campaign Committees). This case involves only the spending of money in campaigns and applicable *expenditure* limits.

stead, the National Committees of both parties will simply have to arrange the direct transfer of funds from their respective Senatorial and Congressional Campaign Committees, as authorized by § 441a(a)(4), and then the National Committees (instead of the Senatorial or Congressional Campaign Committees) will expend those funds within the limits of subsection (d)(3) on behalf of selected candidates for the Senate and House in the states.

The net result of plaintiff Democratic Committee's position prevailing is that not one dollar less will be spent, not one dollar will be changed from where the members of the national committee, or state committee in consultation with the Senatorial or Congressional Campaign Committees of their respective parties, want the dollar to be expended. All that will happen is that the money will be transfered and administered in a manner which *neither* major political party has found most efficient, but which the Federal Election Commission has held is the exact practical equivalent of the practice of authorized delegation now being followed by both political parties.

An obvious question arises: If the respective committees can transfer and spend the money in precise technical compliance with both relevant subsections of the statute, why do not the committees use this form and achieve the same substance? The record is bare of any explanation of why the various committees have followed the current practice, which dates at least from 1976. Both major parties use the method of their respective National Committees authorizing the Senatorial and Congressional Campaign Committees as agents to make expenditures for candidates within the statutory limits. Only the Republicans have seen fit to have their state committees so work with the National Campaign Committees. There may be advantages of economy of scale in expenditures from

one source, of available expertise in creating and placing advertisements, in obtaining media exposure, in obtaining credit during the campaign, etc.; the court can only speculate. All we know is that both parties employ the indirect method of expenditure by authorizing the committees in Washington as agents, that it must have some functional advantage, and that the Democratic Senatorial Campaign Committee (which does not act as an agent for Democratic *state* committees) has taken the trouble to challenge the National Republican Senatorial Committee's actions as agent for Republican state committees.

III. Established Precedent—Action and Opinion

While the advantage of what the intervenor Republican Committee is doing is not obvious from the record, the profound—and grossly unfair—disadvantage of the court sustaining this Democratic Committee challenge at this late hour is undeniably clear. The actions challenged were in accord with the precedent established over the lifetime of the practice of delegation by both the national and state committees, which rest on the same rationale.

(1) In 1976 the Republican National Committee (RNC) designated the National Republican Senatorial Committee (NRSC) as its agent to make the expenditures for congressional campaigns permitted under subsection (a)(4) and (d)(3).[10] The Democratic National Committee filed a complaint challenging this indirect method, but withdrew it.[11]

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[10] *See* Brief for Appellee at 3; Appellant's Brief at 20 n. 16; Brief in Behalf of Intervenor, Republican National Senatorial Committee at 3–4.

[11] *See* Brief in Behalf of Intervenor, Republican National Senatorial Committee at 4.

(2) Representative Cleveland requested an advisory opinion on the practice, which was specifically approved in Advisory Opinion 1976–108, cited above.[12]

(3) At this time the FEC was engaged in rulemaking, and produced § 110.7 *Party Committee Expenditure Limitations* (2 U.S.C. § 441a(d)). Regulation § 110.7(a)(4) specifically approves the *national* committee of a party making any authorized expenditure under § 441a(d) "through any designated agent" in connection with a presidential campaign. No reference was made to a *state* committee acting through an agent, although both national and state committees are authorized to make expenditures by § 441a(d); the explanation offered is that at that time in 1976 no state committee had made any agency designation in either a presidential or a congressional campaign. Furthermore, it was only in 1978, after the regulation was promulgated, that agency designations were made by state committees to the Congressional Committees in campaigns for House and Senate races.[13]

(4) In 1978 several Republican state committees followed the practice begun in 1976 by the RNC and designated the intervenor National Republican Senatorial (or Congressional) Committee as an agent to make expenditures for the benefit of congressional candidates. This was challenged in two complaints. In MUR 780[14] the FEC concluded on 19 January 1979 that the NRSC had not violated 2 U.S.C. § 441a(d) by making § 441a(d) expenditures as agent of *both* the Montana Republican *State* Committee and the

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[12] *Reprinted in* Brief for Appellee, Commission Appendix at 3a; [1980] Fed. Elec. Camp. Fin. Guide (CCH) ¶5236.

[13] *See* Brief in Behalf of Intervenor, Republican National Senatorial Committee at 4.

[14] *See* Commission files, Matter Under Review, MUR 780 (19 Jan. 1979).

Republican *National* Committee. Likewise, in MUR 820 the FEC concluded on 19 June 1979 that there was no violation of § 441a(d) by the NRSC acting as agent of both the RNC and the Alabama Republican Party.[15] The plaintiff here, the Democratic Senatorial Campaign Committee, did not protest or attempt to overturn these FEC rulings until May 1980 with the filing of this complaint before the FEC.

Surely this was amply reassuring precedent for the intervenor NRSC to continue in this campaign year the practice of acting as agent of the RNC and state committees to make expenditures under §§ 441a(a)(4) and (d)(3), a practice which had been validated and sustained by the FEC against every challenge since 1976. In reliance thereon the intervenor NRSC has entered into contracts for campaign activities, with the media and political suppliers, and with employees to serve during the campaign. These are substantial commitments of millions of dollars, which this court now throws into jeopardy and confusion 30 days before the campaign is to end, in spite of four years of precedential rulings contra by the responsible agency, the FEC, confirmed in this specific case by the FEC General Counsel's opinion, the unanimous 6 to 0 vote of the FEC members, and the decision of the District Court.

One minor point perhaps should be noted at this time. While counsel for the Democratic Senatorial Campaign Committee responded in answer to a direct question from the court at oral argument that the plaintiff was "not challenging transfers in this case," yet it has been suggested that neither the Democratic Senatorial Campaign Committee nor the National Republican Senatorial Committee (nor their respective Congressional Campaign Committees) are "na-

[15] *See* Commission files, MUR 820 (19 June 1979).

tional" committees within the meaning of § 441a(a)(4) authorizing unlimited "transfers between and among committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party." We can assume for the disposition of this case, since no party challenges it, that the Senatorial Campaign Committees are within the scope of the "transfer" provision.[16]

IV. Two Principal Purposes of the Federal Election Campaign Laws

It is undisputed that two of the principal objectives of reform in the conduct of federal elections were, first, putting some kind of an overall limit on the horrendously escalating cost of political campaigns, and, secondly, eliminating the pernicious influence of the large Campaign Contributor over the political candidate or political officeholder.[17] These two reform

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[16] The broad, inclusive scope of the transfer provision, 2 U.S.C. § 441a(a)(4), the compelling need for Commission discretion, and the congressional contemplation of joint "national committee"/"Senatorial Campaign Committee" activity obvious in 2 U.S.C. § 441a(h), all suggest that any committee of a political party, including a party's Senatorial Campaign Committee, would be free to initiate and receive funds transfers under § 441a(a)(4). The Senatorial and Congressional Campaign Committees are identifiable as, and are in fact, part of either the Republican or Democratic parties. *See* 119 Cong. Rec. S5194 (daily ed. 3 Apr. 1974)(remarks of Sen. Baker). Furthermore, "[t]he conferees also determined that it is appropriate to set a higher limit on contributions from persons to political committees of national political parties in order to allow the political parties to fulfill their unique role in the political process. In this connection, the term 'political committee established or maintained by a national political party' includes the Senate and House Campaign Committees." H. R. Rep. No. 94-1057 (Conf. Rep.), 94th Cong. 2d Sess. 58 (1976) (discussion of 2 U.S.C. §§ 441a(a)(1)(B)-(2)(B)).

[17] *See Buckley* v. *Valeo*, 424 U.S. 1, 25-26 (1976) (per curiam).

objectives were to be accomplished in three ways: first, overall limits on campaign expenditures in the races for President, the Senate, and the House; secondly, stringent limitations on the individual contributions which could be made by persons and organized entities to individual candidates and special purpose committees;[18] thirdly, a system of full public disclosure of all expenditures and all except the most minor contributions.

When we look at the plain language of the statutory scheme, we see that there are overall limits on the expenditures in campaigns for the Senate and the House under § 441a(d)(3). There is no suggestion whatsoever in the plaintiff's argument or in my colleague's opinion that the practice challenged here in any way is an attempt to or could evade the overall expenditure limitations of subsection (d)(3). It is perfectly clear that whatever funds of the intervenor NRSC, acting as agent of either the Republican National Committee or a state party committee, are expended on behalf of any given Senatorial candidate, those expenditures must be within the overall limits authorized to the RNC or to the state committee, respectively. This is true whether the Senatorial Committee makes the expenditure itself as a result of being designated as an agent of the state or national committee and authorized thereby to make the expenditure, or whether the Senatorial Committee writes a check to either the national committee or the state committee.

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[18] Controlling campaign contributions, the Supreme Court held in *Buckley* v. *Valeo*, legitimately suppressed corruption and venal influence by eliminating the possibility of *quid pro quos*.

Furthermore, accountability for all funds expended on behalf of a given political candidate by any party political committee is placed in the state's party central committee. Regulation § 110.7,[19] *Party committee expenditure limitations* (*2 U.S.C. 441a(d)*) specifically provides under subsection (c)(1): "The State central committee shall be responsible for insuring that the expenditures of the entire party organization are within the limitations, including receiving reports from any subordinate committee making expenditures under paragraph (b) of this section, and filing consolidated reports showing all expenditures in the State with the Commission." The "expenditures under paragraph (b) of this section" refers to the expenditures of "the general election campaign of a candidate for federal office in that state who is affiliated with the party," *i.e.*, a designated Republican or Democratic candidate for the Senate or for the House.

The second principal purpose of campaign reform, limiting contributions in order to eliminate the evil effects of huge contributions influencing candidates or officeholders, is taken care of in § 441a(a), *Dollar limits on contributions.*[20] As was briefly discussed above, after placing specific limits on (1) persons, (2) multi-candidate political committees, and (3) individual aggregate contributions, the Congress came to consider the possible and probable "contributions" to be anticipated between political committees of the same political party. These, of course, are not "contribu-

[19] 11 C.F.R. § 110.7 (1977).

[20] *See* notes 17–18 *supra* & accompanying text.

tions" in the original sense,[21] they are actually *transfers* of funds which have been received by the respective committees within the contribution limit for individuals and organizations previously set. Hence, the Congress made absolutely clear in § 441a(a)(4) that the limitations on contributions in the above paragraph "do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the the same political party."

The reason for this Congressional exemption of transfers between political committees of the same party is perfectly obvious: there is no evil to be prevented by barring the free exchange of funds among political committees of the same party. There is no fear of undue influence exerted by a large contributor over the individual candidate or political officeholder, for two reasons: (1) the individual contributions have originally been limited by the contribution limits in the statute; and (2) the political candidate or officeholder does not know who made the contributions to the overall national, state, district, or local committee which generously endows him with funds, or, at least,

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[21] Party committees, including Senatorial and Congressional Campaign Committees, it is worth noting, are deemed incapable of making *independent expenditures* which were accorded great protection in *Buckley* v. *Valeo*, 424 U.S. 1 (1976) and *Common Cause* v. *Schmitt*, Nos. 80-1609 & 80-1754 (D.D.C. 30 Sept. 1980) (three-judge court). *See* Brief for Appellee at 10 n.5. 2 U.S.C. § 441a(d) is the only statutory authorization for *expenditures* by party political committees. There is no support for an inference that Senatorial and Congressional Campaign Committees were meant by Congress to be excluded from making *any expenditures* at all in connection with campaigns. It makes more sense that these campaign Committees should share in their parties' overall expenditure limitations.

he does not know who contributed the specific dollars which the individual candidate receives.[22] And, no matter by whom or by whose agency the expenditures are made, the expenditures on any candidate's behalf must be within the limits of § 441a(d)(3). Since there was no evil to be prevented by imposing a restriction on transfers, Congress very wisely specifically said that there were no limits on transfers; and, the Federal Election Commission, charged with implementing and enforcing the campaign laws, has very wisely and sensibly said, from the start and consistenly thereafter, that the practice of designating another committee as an agent and authorizing expenditures of funds by the agent, when the funds could have been directly transferred anyway, is the equivalent of the transfers specifically authorized by the statute.

Not only is there no evil to be prevented by the limitation which the plaintiff Democratic Committee has persuaded my colleagues to write into the statute, but there are positive benefits to be gained by allowing the free interchange of funds among political committees of the same party, whether by direct transfers or indirectly by authorizing another committee to act as agent in making the expenditures. A party cannot "unduly influence" its own candidate, but by supplying funds for the individual candidate it may instill in the candidate some sense of party loyalty and party responsibility, which is generally recognized to be a beneficial relationship. Certainly to the extent an individual candidate is beholden to his own political party for a substantial portion of his campaign funds, he is much less vulnerable to individual pressure

[22] *See generally Common Cause* v. *Schmitt*, Nos. 80-1609 & 80-1754 (D.D.C. 30 Sept. 1980) (three-judge court).

groups who would sway his vote, for good or evil, on certain critical issues."[33]

It should not be overlooked that the funds raised by the committees referred to in subsection (a)(4), whose funds are to be freely transferred, are funds raised from citizens all over the United States. To that extent they are an amalgamation, an expression of support from small contributors. In that respect they are similar to the funds raised through the federal tax process by the check-off on individual income tax returns, which is an expression of national policy preferring funds to be raised as anonymously and in as widespread a fashion as possible. To the extent that these funds can be used freely in individual Senate and House campaigns, we are implementing a definite national policy. The position urged by the plaintiff here and adopted by Judges Wright and Ginsburg cuts directly contrary to that salutary policy by eliminating the most effective and efficient method chosen.

V. First Amendment Considerations

It is quite apparent from the lengthy Congressional debates in regard to the federal election laws over a period of years that Congress was quite aware of the fact that, in imposing contribution and expenditure limitations, it was legislating in an area of vital First Amendment concerns. If there was any legislator who was not aware of that, he was surely made aware of it by the Supreme Court's decision in *Buckley* v. *Valeo*. "The Act's contribution and expenditure limitations

[33] As a Congressman, Judge Abner Mikva, presently a member of this court, argued for the benefits of free transferability of party funds. 124 Cong. Rec. H2263 (daily ed. 21 March 1978).

operate in an area of the most fundamental First Amendment activities."[24]

There is no need to rehash the extensive Supreme Court analysis on the First Amendment grounds in *Buckley*. It is clear that the Court held that construction of the Act must be made in light of First Amendment rights, and so must this court's construction here. It is sufficient to point out that the Supreme Court sustained limitations on individual contributions only because the perceived evil of undue influence by large contributors on candidates and officeholders was sufficient to justify these restrictions. At the same time, the Supreme Court struck down the limitations on individual expenditures on behalf of his own individual candidacy, because the use of money by an individual is a form of speech protected by the First Amendment, and there could be no evil of undue influence by one man exercising his first Amendment rights.

Similarly, in the case at bar, there is no visible evil in any "undue influence" by a political party on its own nominated candate for the Senate or the House.[25] Hence, there is absolutely no evil to be eliminated by gratuitously imposing a restriction on the free interchange of funds among the political committees of the same political party, so long as those funds are accounted for and the expenditures are controlled by a designated accountable committee within the overall limitations on expenditures for that office. It is illuminating to compare the specific restrictions, which Congress did clearly write into the statute, with the

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[24] 424 U.S. 1, 14 (1976).

[25] *Cf. Common Cause* v. *Schmitt*, Nos. 80-1609 & 80-1754 (D.D.C. 30 Sept. 1980) (three-judge court) at Part III, A. 4. (political committees, through expenditures rather than contributions, do not pose *quid pro quo* threat).

tortuous and convoluted construction which my colleagues find it necessary to engage in to sustain the prohibition against free interchange of funds argued for the plaintiff Democratic Committee.[26] When there is no clear, specific prohibition against the action complained of, the difficulty of finding the rationale to restrict free speech should be proof positive that my colleagues are engaged in an unworthy effort.

Mark this well. No person, no group of persons (committee) needs the *permission* of any Congress or any court to spend money to assist candidates for public office. That is free speech. There can be limitations and regulations as to amounts, methods, publicity, and accountability, but the validity of those limitations will be strictly tested. The limitation must be justified by the evil which the limitation is designed to prevent, just as we test any other limitation on free speech. In this, as in any other area of free speech, the limitation must be precisely spelled out and clearly relevant

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[26] The First Amendment protects political association as well as political expression. The constitutional right of association explicated in *NAACP* v. *Alabama*, 357 U.S. 449 460 (1958), stemmed from the Court's recognition that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee "freedom to associate with others for the common advancement of political beliefs and ideas," a freedom that encompasses "*[t]he right to associate with the political party of one's choice.*" *Kusper* v. *Pontikes*, 414 U.S. 51, 56, 67 (1973), quoted in *Cousins* v. *Wigoda*, 419 U.S. 477, 487 (1975). *Buckley* v. *Valeo*, 424 U.S. 1, 15 (1976) (italic added). *See also Common Cause* v. *Schmitt*, Nos. 80–1609 & 80–1754 (D.D.C. 30 Sept. 1980) (three-judge court) at Part III B.

to prevention of evil."[27] Neither the plaintiff nor my colleagues have even claimed any evil to be prevented by the restriction they would engraft on the statute. Section 441a(d)(3) is no prohibition on the activities of intervenor National Republican Senatorial Committee, but an overall limit on expenditures for federal elective office and a method of accounting utilizing the respective party national and state committees. The only other relevant provision, § 441a(a)(4), authorizes the intervenor NRSC to do directly what it has done indirectly here. In what the Supreme Court has termed "an area of the most fundamental First

[27] I submit that the majority fails to grasp the significance of what the Supreme Court did in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), in upholding limits on Contributions, but striking down limits on Expenditures. (*See* maj. op. at n. 27.) *Both* are in the First Amendment area. Where contributions are concerned, the evil of the *quid pro quo* is obvious, so the statutory limits are justified. Expenditures are a different matter, for there is no visible corruption when money amplifies free speech; *hence the Court struck down every limitation on Expenditure challenged on First Amendment grounds.* In so doing the Court spoke in terms relevant to the majority's effort to restrict expenditures here:

> "No governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by § 608(c)'s campaign expenditure limitations.
>
> * * * * *
>
> "The interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by § 608(c)'s campaign expenditure ceilings." (p. 55)
>
> * * * * *

Amendment activities," this is a shaky foundation for the decision my colleagues stretch to reach.

"The interest in equalizing the financial resources of candidates competing for federal office is no more convincing a justification for restricting the scope of federal election campaigns."

* * * * *

"There is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate.[64]

[64] As an opinion dissenting in part from the decision below noted: "If a senatorial candidate can raise $1 from each voter, what evil is exacerbated by allowing that candidate to use all the money for political communication? I know of none." 171 U.S. App. D.C., at 268, 519 F.2d, at 917 (Tamm, J.)" [in which this writer joined]. (p. 56)

"The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates *and collectively as associations and political committees*—who must retain control over the quantity and range of debate on public issues in a political campaign.

"For these reasons we hold that § 608(c) is constitutionally invalid." (pp. 57–58)

The Court went on to *validate contribution ceilings*, but "[b]y contrast, *the First Amendment requires the invalidation of the Act's independent expenditure ceiling*, § 608(e)(1), its limitation on a candidate's expenditures from his own personal funds, 608(a), *and its ceilings on overall campaign expenditures*, § 608(c). These provisions place substantial and direct restrictions on the ability of candidates, citizens, *and associations* to engage in protected political expression, restrictions that the First Amendment cannot tolerate." (Emphasis added.) *Id.* at 58–59.

The specific holding of *Buckley* was, of course, as the majority suggests (maj. op. at n. 27), to invalidate the *independent* expenditure limitations, not to rule on expenditures of a political party committee—a ruling which, if made, would have left one point of view in the case at bar bereft of any support whatsoever. But surely the language used by the Court, the rationale of sustaining restrictions *only* where there was an obvious evil to be prevented, is highly relevant to our problem here. *Buckley* confirms that *all* of FECA's campaign "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." 424 U.S. at 14.

APPENDIX D

United States Court of Appeals for the District of Columbia Circuit

No. 80-2074

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE
APPELLANT

v.

FEDERAL ELECTION COMMISSION

NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
INTERVENOR

September Term, 1980

Civil Action No. 80-01903

Appeal from the United States District Court for the District of Columbia

Before: WRIGHT, Chief Judge, and WILKEY and GINSBURG, Circuit Judges

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment---------- of the District Court appealed from in this cause is hereby reversed; appellee Commission's failure to act is declared to be contrary to law; and said appellee is directed to conform with this decision forthwith, all in accordance with the Opinion of this Court issued herein this date in photocopy form.

Per Curiam
For the Court

GEORGE A. FISHER,
Clerk.

Date: October 9, 1980.
Opinion for the court per curiam.
Dissenting opinion filed by Circuit Judge Wilkey.

APPENDIX E

United States Court of Appeals for the
District of Columbia Circuit

No. 80-2074
September Term, 1980

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
APPELLANT

v.

FEDERAL ELECTION COMMISSION

CA 80-01903

Before: WRIGHT, Chief Judge; WILKEY and GINSBURG, Circuit Judges

ORDER

It is ordered, by the Court, *sua sponte*, that the Clerk shall issue the mandate in this case forthwith.

Per Curiam

For the Court:

GEORGE A. FISHER,
Clerk.

Date: October 9, 1980

APPENDIX F

United States Court of Appeals for the
District of Columbia Circuit

No. 80-2074
September Term, 1980

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
APPELLANT

v.

FEDERAL ELECTION COMMISSION
NATIONAL REPUBLICAN SENATORIAL COMMITTEE,

INTERVENOR

Civil Action No. 80-01903
Before: WRIGHT, Chief Judge; WILKEY and GINSBURG,
Circuit Judges

ORDER

Upon Consideration of intervenor's petition for rehearing and of its application to recall mandate, it is

ORDERED, by the Court, that intervenor's petition and its application are denied.

Per Curiam

For the Court:

GEORGE A. FISHER,
Clerk.

Date: October 11, 1980

APPENDIX G

United States Court of Appeals for the District of Columbia Circuit

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No. 80-2074
September Term, 1980

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
APPELLANT

v.

FEDERAL ELECTION COMMISSION

NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
INTERVENOR

Civil Action No. 80-01903

Before: WRIGHT, Chief Judge; MCGOWAN, TAMM, ROBINSON, ROBB, WILKEY, WALD, EDWARDS, and GINSBURG, Circuit Judges

Order

The suggestion for rehearing *en banc* filed herein by intervenor having been transmitted to the full Court and a majority of the judges in regular active service not having voted in favor thereof, it is

ORDERED, BY THE COURT, *EN BANC,* that intervenor's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

For the Court:

GEORGE A. FISHER,
Clerk.

Notations by individual judges as to how they voted may be added later.

Date: October 11, 1980

APPENDIX H

Supreme Court of the United States

No. A–332

NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
APPLICANT

v.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE
AND FEDERAL ELECTION COMMISSION

Order

UPON CONSIDERATION of the application for stay by counsel for the applicant,

IT IS ORDERED that counsel for the Democratic Senatorial Campaign Committee and the Federal Election Commission shall file responses by noon, Tuesday, October 21, 1980.

IT IS FURTHER ORDERED that the mandate of the United States Court of Appeals for the District of Columbia Circuit in No. 80–2074 is stayed pending receipt of the responses and further order of the undersigned or of the Court.

/s/ WARREN E. BURGER,
Chief Justice of the United States.

Dated this 17th day of October, 1980.
A true copy Michael Rodak, Jr.
Test:

Clerk of the Supreme Court
of the United States
by Francis J. Lorton, Deputy.

○

Office-Supreme Court, U.S.
FILED
APR 16 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-939 and 80-1129

In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
RESPONDENT.

NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
PETITIONER,

v.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI IN NO. 80-939
FILED DECEMBER 10, 1980
PETITION FOR CERTIORARI IN NO. 80-1129
FILED JANUARY 6, 1981
CERTIORARI GRANTED MARCH 2, 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 80-939 and 80-1129

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, RESPONDENT.

NATIONAL REPUBLICAN SENATORIAL COMMITTEE, PETITIONER,

v.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

United States District Court for the District of Columbia:

July 30, 1980	Complaint; appearance.
July 30, 1980	Summons (3) and copies (3) of complaint issued.
July 31, 1980	Motion of plaintiff to shorten time for filing of responses and for expedited consideration.
July 31, 1980	Motion of plaintiff for summary judgment; statement of material facts; memorandum of points and authorities, index, table of authorities, affidavit of Tom Baker, exhibits 1-4.
August 7, 1980	Affidavit of Service by Roger Whitfield as special process server upon defendant Federal Election Commission on 7-30-80.
August 18, 1980	Stipulation filed 8-14-80 extending time for defendant until 8-20-80 to file an opposition and cross-motion for summary judgment, approved. June L. Green, J.
August 18, 1980	Motion of defendant for summary judgment, statement of material facts, statement of genuine issues in response to plaintiff's statement of material facts, memorandum, index, exhibits 1, 2 and 3.
August 18, 1980	Status Call: hearing set for 8-22-80 at 2:00 P.M. June L. Green, J.
August 21, 1980	Memorandum of plaintiff in opposition to respondent's motion for summary judgment, index, table of authorities.
August 22, 1980	Cross-motion for summary judgment heard and taken under advisement. June L. Green, J.

August 26, 1980	Motion by National Republican Senatorial Committee for leave to intervene as party defendant; Affidavit of James F. Schoener in support of motion to intervene; Exhibit.
August 28, 1980	Memorandum Opinion. June L. Green, J.
August 28, 1980	Order denying petition of National Republican Senatorial Committee for leave to intervene. June L. Green, J.
August 28, 1980	Order denying motion of petitioner Democratic Senatorial Committee for summary judgment; granting motion of respondent Federal Election Commission for summary judgment; dismissing action. (CASE CLOSED) Green, J.
August 29, 1980	Memorandum by plaintiff in opposition to motion of NRSC for leave to intervene.
September 3, 1980	Notice of Appeal by plaintiff from order entered 8-28-80; copy sent to Charles N. Steele and Scott E. Thomas.
September 3, 1980	Copies of Notice of Appeal and docket entries transmitted to U.S.C.A. # 80-2074.
September 11, 1980	Copy of Order of U.S.C.A. dated 9-10-80 directing Clerk of U.S.D.C. to certify and transmit record on appeal forthwith. U.S.C.A. # 80-2074.
September 15, 1980	Record on Appeal delivered to U.S.C.A. Receipt acknowledged.
October 10, 1980	Certified copy of Judgment of U.S.C.A. filed 10-9-80 reversing judgment of U.S. District Court; appellee Commission's failure to act is declared to be contrary to law; and said appellee is directed to conform with this decision forthwith, all in accordance with the Opinion of this Court issued herein this date in photocopy form. Attachment.

October 14, 1980	Copy of Order from U.S.C.A. dated 10-11-80 denying intervenor's petition and its application (U.S.C.A. # 80-2074)
October 14, 1980	Copy of Order from U.S.C.A. dated 10-11-80 denying intervenor's suggestion for rehearing *en banc*. (U.S.C.A. # 80-2074).

United States Court of Appeals for the District of Columbia Circuit:

September 4, 1980	Copy of notice of appeal and docket entries from Clerk, District Court.
September 4, 1980	Appellant's motion to shorten time for filing briefs and for expedited consideration.
September 4, 1980	Appellant's motion to expedite consideration of motion to shorten time for filing briefs and for expedited consideration.
September 8, 1980	Appellee's (FEC) response to appellant's motion to shorten time for filing briefs and for expedited consideration.
September 9, 1980	Appellant's brief.
September 9, 1980	Statutory Appendix.
September 9, 1980	Joint Appendix.
September 10, 1980	Per Curiam order that the Clerk of the District Court is directed to certify and transmit the record on appeal forthwith; and that appellee's brief be filed by the close of business 9-24-80. Counsel for appellee are directed to cause personal service of the brief upon counsel for appellant. Appellant's reply brief, if any, shall be filed by the close of business 9-29-80; and that the Clerk is directed to advance this case on the docket of the Court and schedule it ahead of all other actions for argument on the merits in accordance with 2 U.S.C. § 437g(a)(10)(1980); Tamm, MacKinnon and Ginsburg (who did not participate), Circuit Judges.

September 12, 1980	Appellant's motion for reconsideration of 9-10-80 order.
September 15, 1980	Per Curiam order granting appellant's motion for reconsideration of this Court's order of September 10, 1980; and that appellee's brief be filed on 9-22-80; and that the case be set for oral argument on 9-24-80; and reply brief to be filed thereafter; and that the Clerk of the Court immediately draw an emergency division of the Court to hear the case on said 9-24-80; Tamm, MacKinnon and Ginsburg (who did not participate), CJ's.
September 17, 1980	Clerk's order, sua sponte, that oral argument in this case shall take place on September 23, 1980 at 2:30 P.M. instead of September 24, 1980, as originally scheduled. In all other respects, the provisions of this Court's order entered September 15, 1980 remain in full effect.
September 18, 1980	Motion of National Republican Senatorial Committee for leave to intervene.
September 18, 1980	Appellant's opposition to motion of NRSC for leave to intervene.
September 19, 1980	FEC's opposition to motion of NRSC for leave to intervene.
September 22, 1980	Per Curiam order granting motion of National Republican Senatorial Committee for leave to intervene and, sua sponte, following times are allotted for oral argument. Appellant—30 minutes; FEC—20 minutes; NRSC—10 minutes; Intervenor is requested to file a memorandum of not more than 15 pages addressed to statutory issue. The memorandum shall be filed no later than 2:00 P.M. on 9-22-80; Circuit Judges Wright; Wilkey & Ginsburg, CJs.

September 22, 1980	Appellee's brief.
September 23, 1980	Argued before CJ Wright, Wilkey and Ginsburg, CJ's.
September 29, 1980	Appellant's reply brief.
October 9, 1980	Opinion per curiam issued in xerox form today, will be printed at a later date.
October 9, 1980	Dissenting opinion filed by Circuit Judge Wilkey, filed in xerox form.
October 9, 1980	Judgment reversing the judgment of the District Court.
October 9, 1980	Ordered by the Court that the mandate issue forthwith.
October 9, 1980	Copy of opinion, certified copy of judgment and order to issue mandate issued to District Court.
October 10, 1980	Motion of National Republican Senatorial Committee to recall mandate.
October 10, 1980	Petition of National Republican Senatorial Committee for rehearing and suggestion for *rehearing en banc.*
October 11, 1980	Per Curiam order denying intervenor's petition for rehearing and its application to recall mandate; CJ Wright; Wilkey & Ginsburg, CJs.
October 11, 1980	Per Curiam order, *en banc,* that intervenor's suggestion for *rehearing en banc* is denied; CJ Wright; McGowan, Tamm, Robinson, Robb, Wilkey, Wald, Edwards & Ginsburg, CJs (Notations by individual judges as to how they voted may be added later).

October 20, 1980	Certified copy of order from Clerk, Supreme Court in SC No. A-332 dated October 17, 1980; counsel for the Democratic Senatorial Campaign Committee and the Federal Election Commission shall file responses by noon, Tuesday, October 21, 1980 to the application for stay by the National Republican Senatorial Committee; the mandate of this Court is stayed pending receipt of the responses and further order of the Supreme Court.
October 23, 1980	Copy of letter from Clerk, Supreme Court stating that order was entered on October 22, 1980 in SC No. A-332 that "The motion to vacate the temporary stay, heretofore entered by the Chief Justice on 10-17-80 is denied."
October 31, 1980	Certified copy of order from Clerk, Supreme Court in SC No. A-332 dated October 28, 1980: "the motion of October 17, 1980 to vacate the stay entered on October 17, 1980, was presented to full Court on October 21, 1980 and by the full Court was denied; Accordingly, the motion dated October 27, 1980 to expedite consideration of the application for stay is dismissed as moot."
March 4, 1981	Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 80-939 on 3-2-81.
March 4, 1981	Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 80-1129 on 3-2-81.

LIST OF RELEVANT DOCUMENTS REPRODUCED IN THE APPENDICES TO THE PETITIONS AND TO THE OPPOSITION, RULE 30.1.

	FEC Pet.	DSCC Opp.	NRSC Pet.
District Court Opinion in C.A. No. 80-1903	App. B at 22	App. B at B1	App. B at B1
District Court Judgment in C.A. No. 80-1903	App. B at 21	App. B at B5	App. B at B5
Court of Appeals Opinion in No. 80-2074	App. C at 26	App. A at A1	App. A at A1
Court of Appeals Judgment in No. 80-2074	App. D at 70	App. D at D1	App. E at E1
Court of Appeals Order to Issue Mandate in No. 80-2074	App. E at 72		
Court of Appeals Order Denying Petition for Rehearing and Application to Recall Mandate	App. F at 73	App. E at E1	App. F at F1
Court of Appeals Order Denying Suggestion for Rehearing *En Banc*	App. G at 74	App. E at E2	App. F at F2
FEC Certification in the Matter of National Republican Senatorial Committee MUR 1234	App. A at 17	App. C at C1	App. C at C1
FEC Certification in the Matter of National Republican Senatorial Committee MUR 780	App. A at 18		
FEC Certification in the Matter of National Republican Senatorial Committee MUR 820 (78)	App. A at 19		
FEC First General Counsel's Report—MUR 1234			App. D at D1
Supreme Court Order in No. A-332 Granting Stay Pending Receipt of Responses	App. H at 76		

SUPREME COURT OF THE UNITED STATES

TUESDAY, OCTOBER 21, 1980

ORDER IN PENDING CASE

No. A-332

NATIONAL REPUBLICAN SENATORIAL COMMITTEE

v.

DEMOCRATIC SENATORIAL CAMPAIGN COMM., ET AL.

The motion to vacate the temporary stay, heretofore entered by the Chief Justice on October 17, 1980, is denied.

SUPREME COURT OF THE UNITED STATES

No.—A-332, October Term, 1980

NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
APPLICANT,

v.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE

and

FEDERAL ELECTION COMMISSION

ORDER

The motion of October 17, 1980, to vacate the stay entered by the undersigned on October 17, 1980, was presented to the full Court on October 21, 1980, and by the full Court was denied.

Accordingly, the motion dated October 27, 1980, to expedite consideration of the application for a stay is dismissed as moot.

/s/ Warren E. Burger
WARREN E. BURGER
Chief Justice of the United States

Dated this 28th
day of October, 1980.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 344675 310 (1 OF 2)

Office-Supreme Court, U.S.
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FEB 6 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-939
NO. 80-1129

In The Supreme Court of The United States

October Term, 1980

FEDERAL ELECTION COMMISSION
and
NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
Petitioners,

vs.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

RESPONDENT'S BRIEF IN OPPOSITION

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FEBRUARY 6, 1981

QUESTIONS PRESENTED FOR REVIEW

1. Has the conclusion of the 1980 Congressional elections rendered this case moot?
2. Must the courts defer to the Federal Election Commission's interpretation of 2 U.S.C. §441a(d), when its interpretation conflicts with the plain language and purpose of the provision, and when the basis of that interpretation is neither clearly nor consistently stated?
3. May 2 U.S.C. §441a(d), which confers special spending authority on State party committees, be construed to allow those committees to transfer that authority to another political committee through the device of "agency" agreements?
4. Is the prohibition on "agency" agreements an impermissable infringement on the First Amendment rights of a political committee seeking to assume the limits expressly delegated to State committees under 2 U.S.C. §441a(d)?

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Republican National Committee v. Federal Election Commission, Fed. Elec. Camp. Fin. Guide (CCH) ¶9112 (S.D.N.Y. Feb. 5, 1980) *aff'd*, 48 U.S.L.W. 3662 (April 14, 1980) 16
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No. 80-939

In The Supreme Court of The United States

October Term, 1980

FEDERAL ELECTION COMMISSION
and
NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
Petitioners,

vs.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Respondent's Brief in Opposition

The Respondent, Democratic Senatorial Campaign Committee, respectfully requests that this Court deny the petitions for writ of certiorari, filed by the Federal Election Commission and by the National Republican Senatorial Committee, seeking review of the United States Court of Appeals for the District of Columbia's opinion in this case.

OPINIONS BELOW

The opinion of the Court of Appeals and the opinion of the United States District Court for the District of Columbia, not yet reported, appear in the Appendix hereto. The Appendix also contains the certification of the vote of the Federal Election Commission.

JURISDICTION

The Judgment of the Court of Appeals was entered October 9, 1980. A petition for rehearing, application to recall mandate, and suggestion for rehearing *en banc* were denied on October 11, 1980. Jurisdiction of this Court has been defeated by virtue of the occurrence of events mooting this action, specifically, the conclusion of the 1980 Congressional elections over which this controversy originally arose.

STATEMENT OF THE CASE

Section 441a(d) of the Federal Election Campaign Act ("FECA"), as amended, 2 U.S.C. §441a(d), grants special spending authority in general election campaigns for the United States Senate to certain specifically defined "political committees".[1] Those committes are (1) "the national committee of a political party" and (2) "a State committee . . . of a political party, including any subordinate committee of a State committee." 2 U.S.C. §441a(d)(3). Each of these named party committees is allowed to spend the greater of $20,000, or "2 cents multiplied by the voting age population of the State", on behalf of their party's candidates for the United States Senate. 2 U.S.C. §441a(d)(3). The spending power conferred by §441a(d) on these committees exceeds that allowed other types of political committees or individuals.[2]

Beginning in 1976, pursuant to regulations promulgated by the Federal Election Commission ("FEC"),[3] the national

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[1] The Federal Election Campaign Act of 1971 ("the Act" or "FECA"), P. L. 92-225, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, P. L. 93-443, 88 Stat. 1263; as amended by the Federal Election Campaign Act Amendments of 1976, P. L. 94-283, 90 Stat. 475; as amended by the Federal Election Campaign Act Amendments of 1977, P. L. 95-216, 91 Stat. 1655; and as amended by the Federal Election Campaign Act Amendments of 1979, P. L. 96-187, 93 Stat. 1339.

[2] Individuals are subject to the following limits: (1) $1,000 per candidate per election; (2) $5,000 to any "political committee" in a calendar year; (3) $20,000 to the political committees "established and maintained" by a national political party; and (4) a $25,000 limit overall on all contributions made in a calendar year. *See* 2 U.S.C. §§ 441a(a)(1), 441a (a)(3). Political committees may contribute $1,000 to a candidate; "multi-candidate" committees may contribute $5,000. 2 U.S.C. §§441a(a)(2), 441a(a)(4).

[3] *See* 11 C.F.R. §110.7(a)(4). Until this litigation, when the FEC elected to disavow its prior interpretation before the Court of Appeals, that agency had consistently interpreted this regulation to authorize "agency" agreements between the national committee and any "agent". *See* FEC Advisory Opinion 1976-108 (1977).

committee of the Republican Party, the Republican National Committee, designated the National Republican Senatorial Committee ("NRSC") as its "agent" under § 441a(d). The NRSC is a "political committee" registered with the Federal Election Commission and established by Republican members of the U.S. Senate to support incumbent and non-incumbent Republican Senate candidates. The "agency" arrangement in question consisted, simply, of the NRSC's assumption of the national committee's limits, and its expenditure of its own funds under that limit.[4]

In 1978, State committees of the Republican Party also designated the NRSC as their "agent" under § 441a(d) and thus purported to transfer their spending authority under that section to the NRSC. Once again, while purportedly an "agent", NRSC in fact was the "principal", spending its own money as it saw fit under the limit expressly delegated under § 441a(d) to the State committees. Unlike the case of the national committee "agency" arrangements, no Commission regulation or statutory provision expressly authorizes this agreement with State committees.

By virtue of this "agency" device, the NRSC was positioned to amass, for its own account, the total composite spending ceiling of $3,487,020.80 available to all 34 Republican State committees with Senate races in their States in 1980.[5] The result was extraordinary and unmatched spending power by a single committee in the 1980 Congressional races. For example, in California the NRSC had available a limit of $485,024.00 pursuant to "agency" arrangements with the State committee; in New York, the comparable limit was $379,717.12.[6]

In a complaint filed with the Federal Election Commission on May 9, 1980 and designated by the FEC as Matter Under Review ("MUR") No. 1234, the Democratic Senatorial Compaign Committee ("DSCC") challenged the NRSC's

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[4] For this reason, the Court of Appeals correctly pointed out that the "agency" label was "somewhat misleading". *See* App., *DSCC v. FEC*, at A13.

[5] *See* App., *DSCC v. FEC*, at A4.

[6] *See* App., *DSCC v. FEC*, at A4.

"agency" agreements with State party committees. DSCC did not challenge NRSC's "agency" agreement with the national committee which, in the view of both DSCC and the FEC, had the special sanction of a Commission regulation reviewed by Congress under the Act's one-house veto provision, 2 U.S.C. §438(d). After receiving a response from the NRSC, the FEC General Counsel on July 8, 1980 issued his "First General Counsel's Report" to the Commission, which recommended that the Commission find no "reason to believe" that NRSC's "agency" arrangement with State committees violated §441a-(d). On July 10, 1980, the Commission itself considered MUR 1234 and by a 6-0 vote it found no reason to believe that the FECA had been violated.[7] The Commission did not adopt the First General Counsel's Report, and indeed, gave no reasons whatsoever to explain its actions.

On July 30, 1980, DSCC filed a petition for review of the FEC's actions in the District Court pursuant to 2 U.S.C. §437g(a)(8). That petition sought a declaration that the dismissal of DSCC's administrative complaint was contrary to law because §441a(d) does in fact prohibit the NRSC "agency" arrangements with State committees. The parties stipulated to an expedited schedule in which the matter was to be resolved by cross-motions for summary judgment. The matter was heard by District Judge June L. Green on August 22. Judge Green rendered a decision in favor of the FEC on August 28. The District Court upheld the FEC's interpretation of §441a-(d), and dismissed this action, on the grounds that the agency's finding was not "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."[8]

On September 4, 1980, DSCC docketed its appeal of the District Court decision in the United States Court of Appeals for the District of Columbia Circuit. On September 9, 1980, NRSC moved to intervene, and that motion was granted on September 22. Following full briefing and oral argument on an expedited schedule, the Court of Appeals reversed the District

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[7] *See* App. at C1.

[8] *See* App., *Democratic Senatorial Campaign Committee v. Federal Election Commission*, No. 80-1903, at B4.

Court and held that the FEC's interpretation authorizing the challenged agency agreements was "contrary to law". The Court of Appeals specifically held that the "clear language" of §441a(d) precluded the challenged "agency" arrangements, whereby NRSC assumed the limits specifically allocated by Congress to other, named party committees.[9] Judge Wilkey dissented. On October 10, NRSC filed a petition for rehearing with a suggestion for rehearing *en banc* and an application to recall the mandate. On October 11, the Court of Appeals denied both these motions.[10]

On October 16, NRSC applied to the Chief Justice of the Supreme Court for an order to stay enforcement of the Court of Appeals decision, pending disposition of its petition for a writ of certiorari. On October 16, the Chief Justice entered an order temporarily staying the decision below. Following a motion by DSCC on October 17, the full Court refused to vacate this temporary stay on October 21. With the election only days away, and with the NRSC's use of "agency" arrangements leading to the expenditure of thousands of additional dollars on behalf of Republican Senate candidates, DSCC filed a motion for "expedited consideration" on October 27. The Chief Justice denied this motion as "moot" on October 28. Thus, the temporary stay entered by the Chief Justice on October 17 remains in effect. The FEC then filed a petition for a writ of certiorari on December 10, 1980, and the NRSC filed the same on January 6, 1981.

REASONS WHY THE WRIT SHOULD BE DENIED

Summary of Argument

This case has been mooted by the conclusion of the 1980 Congressional elections, in the course of which NRSC implemented its "agency" agreements with State committees and made all the expenditures challenged by Respondent. There is thus no continuing case or controversy justifying the exercise of jurisdiction by this Court.

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[9] *See* App., *DSCC v. FEC*, at A14.

[10] *See* App. at E1, E2.

In the event that this Court finds that this case is not moot, it should affirm the Court of Appeals decision holding that NRSC's "agency" agreements with State committees violate 2 U.S.C. §441a(d). Deference to the agency decision, which was the basis of the District Court opinion, is not appropriate here, since that decision cannot be reconciled with the plain language of 2 U.S.C. §441a(d) and lacks any reasoned foundation whatever. The Court of Appeals was correct in making an independent examination of the legality of "agency" agreements under §441a(d), and in concluding that those agreements, whereby NRSC assumed the expenditure limit allocated by Congress to State committees, were in violation of that provision.

NRSC's assertion of constitutional protection for "agency" agreements must likewise be rejected. NRSC does not challange the constitutionality of §441a(d) *per se*, but instead seeks constitutional protection for its attempt to rewrite the plain language of the provision to suit its own purposes. In any event, other vehicles are available to NRSC in associating with State party committees under §441a(d), and thus NRSC's First Amendment rights are not burdened in any constitutionally cognizable way by a prohibition on "agency" agreements. To the degree that §441a(d) does burden NRSC's associational rights, it does so only minimally, and the burden is clearly outweighed by the legitimate State interest, expressed in §441a(d), in providing for active State and local political party participation in the federal elective process.

Argument

I. This Case Is Moot Because The 1980 Congressional Elections Have Passed, And No Effective Relief Can Now Be Granted.

With the passing of the Congressional elections of 1980, this case has been mooted. The expenditures challenged in the proceedings below have been made; the resulting harm to DSCC is complete, and no effective relief can be granted now

by this Court. Thus the "live controversy" required for review by this Court is not present, *Sosna v. Iowa*, 419 U.S. 393, 402 (1975), and under the established principles of *United States v. Munsingwear*, 340 U.S. 36 (1950), Respondent respectfully requests that this Court vacate the judgment of the Court of Appeals and instruct the District Court to dismiss the action.

This Court has held that where a challenge to an election law is unique to a particular party in a particular election, passage of the election in question eliminates the live controversy required for review. In *Brockington v. Rhodes*, 396 U.S. 41 (1969), the Court refused to address the constitutional challenge brought by a Congressional candidate to certain State statutory restrictions on independent candidacies. Instead, in the absence of any indication that the candidate petitioner would run for office again, or was representing the interests of any other class of similarly situated candidates or voters, the Court held that ". . . the case is moot because the Congressional election is over." *Id.*, at p. 43. A similar result was reached in *Keane v. National Democratic Party*, 475 F.2d 1287 (1973), where National Party delegates elected under State law challenged the refusal of the National Party to seat them at the National Convention. The passing of the convention then mooted the case, and required its dismissal, before it could be reviewed by this Court.

Here, Respondent brought a challenge to avoid specific harm to specific candidates in the recently concluded Congressional elections of 1980. Respondent did not bring this action in the name of any other parties; nor did any other parties attempt to intervene on the same side as Respondent on the basis of an identical interest in the outcome. This is not therefore one of those election law cases, such as those involving "exclusionary voting and candidate qualifications", *Storer v. Brown*, 415 U.S. 724, 730 (1974), where an identifiable class of other similarly affected individuals or entities would be sure to bring the same action in the future. *See*, e.g. *American Party of Texas v. White*, 415 U.S. 767 (1974); *Dunn v. Blumstein*, 405 U.S. 330 (1972). Moreover, as the instant case establishes, this is the type of challenge which, if brought in the

next election cycle, can be expected to reach this Court speedily for resolution.[11] The doctrine "capable of repetition, yet evading review" does not therefore save this case from a mootness determination. *DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974).

Also significant is Petitioner NRSC's attempt to have this case decided now on constitutional grounds. Proceedings rendered "moot" by events are inappropriate vehicles for the resolution of constitutional issues. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936) (Brandeis, J., concurring). As this Court has stated in applying *Ashwander* principle in another context: "Constitutional adjudication being a matter of 'great gravity and delicacy', we base our refusal to pass on the merits on 'the policy rules often invoked by the Court "to avoid passing prematurely on constitutional questions."'" (citations omitted), *Kremens v. Bartley*, 431 U.S.119, 128 (1977); *See also Franks v. Bowman Transportation Company*, 424 U.S. 747 (1976); *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, [1980] Fed. Elec. Camp. Fin. Guide (CCH) ¶9107. These concerns are especially significant where, as here, the constitutional issues were raised late in the proceedings below, shortly before decision by the Court of Appeals, and were pressed in summary fashion. This Court therefore has been deprived of the valuable guidance of considered judgments below on these same constitutional issues.

II. The Federal Election Commission's Determination In This Case Was Contrary To Law And Not Entitled To Deference Upon Review.

Petitioner FEC, joined by Petitioner NRSC, seeks reversal of the Court of Appeals decision on the basis of the "defer-

[11] The FECA expressly provides for expedited judicial review of challenges to FEC dismissals of administrative complaints. 2 U.S.C. §437g(a)(10). This case was placed on expedited schedule; thus, the DSCC's complaint was filed May 9, 1980, and was reviewed by the FEC, District Court and the Court of Appeals within five months.

ence" allegedly owed its construction of § 441a(d). The protection claimed by the agency under "deference" principles would be virtually absolute; no attempt whatever is made in FEC's petition to this Court to review its reasoning in this case and to vindicate that reasoning, on its merits, as warranting the deference sought.

This Court has made clear, however, that in review of agency decisions, courts must evaluate "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . . ." *Adamo Wrecking Company v. United States*, 434 U.S. 275, 287 n. 5 (1978), (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). It has been recognized that this "power to persuade" is lacking where the agency, as is the case here, offered no discernible or consistent rationale for its decision. *Securities Exchange Commission v. Sloan*, 436 U.S. 103, (1978). Moreover, the existence of prior "consistent" decision does not relieve this Court of the "responsibility to determine whether that practice is consistent with the agency statutory authority."[12] *Id.*, at p. 118.

As the Court of Appeals has painstakingly showed, the decisions of the FEC on the issue presented here exhibited a "troubling absence of consistent reasoning." Indeed the positions taken by that agency in this case alone changed at

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[12] *See* Pet. FEC Br. at p. 9, where it cites its "consistent" interpretation of §441a(d) on this issue. The alleged "consistency" of the FEC's decision on this issue rests on two prior administrative determinations decided only three years ago. *In re National Republican Senatorial Committee*, Federal Election Commission Matter Under Review 820; *In re National Republican Senatorial Committee*, Federal Election Commission Matter Under Review 780. These decisions were however, inconsistent one with the other; and neither can be reconciled with the rationale advanced by the FEC in this case. *See* App. *DSCC v. FEC*, at pp. A9-11. Thus the "consistency" alleged by the FEC is merely one of result, not of considered viewpoint or analysis.

each stage of the proceedings below.[13] Emerging from the erratic course of its reasoning was a result which defies the "clear language" of §441a(d), as well as its statutory context and legislative history.[14] Deference in these circumstances is unquestionably inappropriate and unjustified.

Petitioner FEC, in particular, seeks to evade the consequences of its performance in this case by misconstruing the applicable standard of review. It insists that in cases involving review of its determinations, the courts have consistently held an "arbitrary and capricious" standard.[15] Respondent submits that even under this standard, the agency's continually shifting reasoning, in the face of clear statutory language to the contrary, would not be entitled to deference.[16] Yet those same cases cited by Petitioner FEC also establish that its action may be overturned as "contrary to law", namely, as being in direct conflict with the plain requirements of the statute. *Hampton v. Federal Election Commission*, Fed. Elec. Camp. Fin. Guide (CCH) ¶9036 at 50, 439-40 (D.D.C. 1977), *aff'd* No. 77-1546 (D.C. Cir. July 21, 1978) (unpublished opinion) (FEC action should be set aside if it "was arbitrary or capricious, was in abusive discretion or was otherwise contrary to law"); *In re Carter-Mondale Reelection Committee, Inc.*, [1980] Fed. Elec. Camp. Fin. Guide (CCH) ¶9132 (D.C. Cir. Sept. 12, 1980) (the standard of review was "whether the FEC

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[13] As the Court of Appeals points out, it is not a simple matter to divine the FEC's position. The Commissioners make no formal decisions of their own, nor do they "endorse" or "ratify" the General Counsel's report before them when they make a decision. *See* App. *DSCC v. FEC*, at p. A9, n. 23.

[14] *See* App., *DSCC v. FEC*, at p. A14.

[15] *See* Pet. FEC Br., at pp. 11-13.

[16] The FEC carried an especially demanding burden since the result it seeks to reach, namely, the authorization of "agency" agreements under §441a(d), appears on its face to conflict with the plain letter requirements of the provision. It is in this light, as well, that the prevarications and shifts of the FEC on this issue constitute "arbitrary and capricious" conduct.

has acted arbitrarily, capriciously, or contrary to law"). In all such cases, courts look behind the cloak of "deference" and seek to determine whether the statute can reasonably support the agency's construction. *See*, e.g. *Gelman v. Federal Election Commission*, [1980] Fed. Elec. Camp. Fin. Guide (CCH) ¶9130 (D.C. Cir. July 18, 1980), *cert. denied*, 49 U.S.L.W. 3227 (U.S. Oct. 6, 1980) (No. 80-209) where the court found deference justified when the "agency's interpretation is supported by the language and overall purpose of the statute" and when "petitioner's construction leads to a conclusion illogical or at odds with the apparent purpose of the statute."

Thus, the Court of Appeals correctly found that the agency's construction of §441a(d), which was plainly "contrary to law", did not warrant deference.

III. The Court Of Appeals Correctly Concluded That The National Republican Senatorial Committee's Assumption Of State Committee Limits Violated §441a(d) Of The Act.

A. NRSC's assumption of State committee limits cannot be reconciled with the plain language of §441a(d).

As the Court of Appeals correctly concluded, the unambiguous language of §441a(d) does not permit the construction advanced by NRSC and FEC. The provision confers special spending authority in Congressional elections on only two specifically named, specifically defined party entities: "the national committee" of a political party, and any "State committee", including any of its subordinate committees. The NRSC concededly is neither "the national committee" nor a "State committee".[17] Yet by its construction, and that of the FEC,

[17] 2 U.S.C. §431(14) defines "the national committee" as "the organization which, by virtue of the by-laws of a political party, is responsible for the day-to-day operation of such political party at the na-

it may substitute itself for both such committees and utilize their assigned limits, with its own funds, in spending on behalf of federal candidates.[18] As "plain meaning" continues to be the touchstone in matters of statutory construction, *Securities Exchange Commission v. Sloan*, supra; *Camanetti v. United States*, 242 U.S. 470 (1917); *March v. United States*, 506 F.2d 1306 (1974), the construction of NRSC and FEC here cannot stand.

Indeed neither FEC nor NRSC give any weight to "plain meaning" in their attempt to uphold these "agency agreements". Instead they argue circuitously that since the NRSC may arguably transfer unlimited sums to the State committees, *see* 2 U.S.C. §441a(a)(4), thereby achieving the same results as agency agreements by different means, the statute must logically permit the more direct "agency" approach. It is, however, an established principle, that "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929); *accord, National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974). Congress expressly defined a vehicle for party committee spending in §441a(d), and as its intention could not be clearer, that intention must be honored.

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tional level, as determined by the Commission." The Republican National Committee is the "national committee" of the Republican Party. 2 U.S.C. §431(15) defines "State committee" as the "organization which, by virtue of the by-laws of a political party, is responsible for the day-to-day operation of such political party at the State level, as determined by the Commission."

[18] As the Court of Appeals noted, the "agency" terminology applied to this wholesale assumption by NRSC of State committee limits is "somewhat misleading". *See* App., *DSCC v. FEC*, at p. A14. NRSC does not function at all as an "agent" in the classic sense, but rather as a principal entitled to utilize the full State committee limit with its own funds.

B. The construction urged by petitioners would vitiate the State and local party-building purposes behind § 441a(d).

The constructions urged by Petitioners NRSC and FEC would undercut Congress' attempt in § 441a(d) to provide a vehicle for State and local party development in the political process. Instead of stimulating State committee involvement in federal campaigns, the 2 cent limit assigned to those committees would be a mere supplement to the NRSC's own spending authority. The Court of Appeals correctly concluded that State committees were not intended to serve as "legal shells" in this fashion.[19]

Petitioner NRSC concedes that Congress intended § 441a(d) as a means to ". . . preserve the place of political parties in the elective process."[20] Of course, the political party structure in this country has always functioned on different levels, namely, local, state and national levels, and the legislative history of § 441a(d) makes clear that Congress was concerned as much with State and local party development, as with promotion of the national party structure. *See* remarks of Senator Cannon, Chairman of the Senate Rules Committee and Member of the Conference, 120 Cong. Rec. 518, 525 (1974).[21] Not only did Congress emphasize the State and local party building function, but the Court of Appeals found no indication that Congress anticipated, "much less intended", that

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[19] *See* App., *DSCC v. FEC*, at p. A14.

[20] *See* Pet. NRSC Br., at p. 12 (*citing* S. Rep. No. 93-689, 93rd Congress, 2nd Session, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 103 (1977)).

[21] *See also* remarks of Representative Frenzel, a member of the Conference Committee, who explained on the floor 441a(d)'s purpose in increasing "the role of political parties in campaign financing", and who emphasized the parallel federal and state focus of the provision in granting enhanced spending power to "[B]oth the national committee and the State committee of a political party". 120 Cong. Rec. H10, 332 (daily ed. October 10, 1974).

NRSC as a Congressional campaign committee would supplement its own authority with State committees' 2 cent limit.[22]

The State and local party building concern of §441a(d) does not stand alone, but is manifest throughout the Act. Thus, in §441a(a)(4), State committees are granted a special exemption from one of the conditions precedent to "multicandidate" status, an exemption designed to allow such committees to qualify more readily for a higher $5,000 per candidate per election limit.[23] In addition, State party committees, and only State party committees, are exempted altogether from limits in spending for voter registration and "get-out-the-vote" drives on behalf of Presidential and Vice Presidential candidates, and in spending for campaign materials, such as buttons and bumper stickers, for use in "volunteer" activities on behalf of federal candidates.[24] These last two exemptions, in particular, are expressly and strictly contingent on the State committees funding these activities themselves, without receiving funds for this purpose from any national party committees.[25] Section 441a(d) is therefore fully consistent with these State and local party building provisions.

This view of "overall purpose" of the statute is critical to a fair construction of §441a(d), *Gelman v. Federal Election Commission, supra*, for each provision of the Act must be construed to give the statute as a whole "'the most harmonious, comprehensive meaning possible' in light of the legislative

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[22]Congress provided specifically for spending by Congressional campaign committees, including NRSC, in §441a(h) of the Act, and indeed rejected a proposal to exempt them from limits altogether. As the Court of Appeals has stated, nowhere did Congress manifest in its deliberations the intention or awareness that the Congressional committees would circumvent their limits through "agency" agreements under §441a(d). *See* App., *DSCC v. FEC*, pp. A14-16.

[23]*See* 2 U.S.C. §441a(a)(4). This provision defines the conditions which political committees must satisfy to qualify for the higher "multicandidate" $5,000 per candidate per election limit. One such condition, that of making contributions to five or more federal candidates, applies to all committees "except for any State political party organization".

[24]*See* 2 U.S.C. §§431(8)(B)(x), (xii) and 431(9)(B)(viii), (ix).

[25]*See* 11 C.F.R. §§100.7(b)(15)(vii); 100.7(b)(17)(vii). In discussing the exemption from limits for "volunteer" activities, the House Report stresses its "purpose . . . to encourage volunteers to work for and

policy and purpose." *Weinberger v. Hynsen, Westcott and Dunning, Inc.*, 412 U.S. 609, 632 (1973), citing *Clark v. Uebersee Finanz-Korp.*, 332 U.S. at 488. The Court of Appeals correctly viewed §441a(d) in its statutory context in construing that provision to preclude NRSC's "agency" agreements with State committees.

IV. The Court Of Appeals Decision Neither Implicates Nor Impermissibly Infringes NRSC's First Amendment Rights Of Expression Or Association.

A. No First Amendment issues are presented by interpreting §441a(d) to preclude "agency agreements" with State party committees.

As the Court of Appeals correctly noted, Petitioner NRSC made no "frontal attack" on the constitutionality of §441a(d) limits, and those limits are not in question here.[26] NRSC seeks instead to avail itself fully of §441a(d) spending limits, but only on its own terms, namely, through the device of an "agency agreement" with State committees whereby it assumes those committees' expenditure limits, in their entirety, for its own purposes.

The First Amendment does not confer upon NRSC the right to alter the statute, to its benefit, in this fashion, especially where the alteration sought would be inconsistent with a fundamental Congressional purpose of promoting State and local party activity. *See Republican National Committee v. Federal Election Commission*, (*"RNC v. FEC"*) [1980], Fed. Elec. Camp. Fin. Guide (CCH) ¶9112 (S.D.N.Y. Feb. 5, 1980) *aff'd* 48 U.S.L.W. 3662 (April 14, 1980). Thus, notwithstanding the NRSC's attempt to clothe the issue here in constitutional terms, the issue remains as framed by the Court of Appeals: "... may party organizations effectively rewrite §441a(d)(3) of the Act to displace State committees and substitute Congressional campaign committees in their stead?"[27]

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with local and State political party organizations". H. Rept. No. 96-422, 96th Congress 1st Session, *reprinted in* [1979] U.S. Code Cong. and Admin. News 2860, 2868.

[26] *See* App., *DSCC v. FEC*, at p. A13, n. 28.

[27] *See* App., at p. A18, n. 37.

Moreover, as construed by the Court of Appeals, §441a(d) in no way bars NRSC from meaningful association with State committees in the expenditure of funds under that provision. NRSC may transfer funds to State committees for expenditures by these committees pursuant to §441a(d). 2 U.S.C. §441a(a)(4). NRSC may also hire staff to work with State committees in effecting spending under that provision. What it may not do is vitiate the purpose of the provision altogether by assuming the limits of the State committees, and thereby rendering their intended spending role a nullity. Viewed in its simplest terms, NRSC is claiming here that it is entitled, as a matter of constitutional law, to what is, in its view, the most effective or convenient possible vehicle for the exercise of its associational rights. Yet it is settled that "[N]ot every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." *RNC v. FEC, supra, citing Corbitt v. New Jersey*, 439 U.S. 212, 218 (1978).

In any event, the constitutional burdens alleged by NRSC are not the work of §441a(d) itself, but rather the consequence of an entirely avoidable decision by Republican committees to concentrate all spending powers in NRSC under this "agency" arrangement. NRSC has other alternatives available in associating with State committees under §441a(d), but it has chosen not to exercise them. "Instead of persuading us that this is a case in which a . . . statute has imposed substantial burdens on the Party's right to govern its affairs, appellants' own statement of the facts establishes that it is the Party's exercise of that very right that is the source of whatever burdens they suffer." *Marchioro v. Chaney*, 442 U.S. 191 (1979).

B. If the prohibition on "agency" arrangements does infringe on NRSC's associational rights, these infringements are marginal and are outweighed by significant governmental interests.

In construing §441a(d) to prohibit these "agency" arrangements, the Court of Appeals reasoned that to allow them

would undercut the role of State party committees under the provision and would thereby frustrate the Congressional purpose of promoting "vigorous state party organizations".[28] Contrary to NRSC's representations, this Congressional concern with vital State and local participation in the federal elective process is a significant interest which outweighs any marginal intrusions on NRSC's associational rights.

In the exercise of its constitutional authority to regulate the conduct of federal elections, *Buckley v. Valeo*, 424 U.S. 1, 14 (1974), the Congress has erected in the FECA a complex scheme of financing limit and disclosure requirements. Throughout this legislation, Congress has manifested a strong concern that adequate provision be made in this scheme for the expression of State and local interests and for the continued development of State and local participation. There is nothing novel about this concern; it represents a traditional and continuing State commitment to the principles of "Our Federalism". More specifically, it is directed toward a goal, long recognized as legitimate, of ensuring fair and representative elections. Thus in *Marchiorio v. Chaney, supra*, this Court characterized as a legitimate State interest the regulation of State party committees to ensure their representative character: "The States interest in ensuring that this [elective] process is conducted in a fair and orderly fashion is unquestionably legitimate . . . . [T]hat interest is served by a . . . statute requiring that a representative central committee be established . . . ."[29] *Id.*, p. 2246-7.

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[28] *See* App., *DSCC v. FEC*, at p. A5.

[29] Petitioner NRSC mistakenly suggests that only the interest in avoiding corruption is sufficient to justify marginal infringements on associational rights. *Buckley* does not stand for this proposition; it merely found it unnecessary to look beyond that interest in sustaining the limits on contributions that Congress sought to impose. 424 U.S., at 27 (1974). In other contexts, which NRSC fails to mention, the Court has found other interests sufficient to sustain direct and significant infringements on political activity. *See United Public Workers v. Mitchell*, 330 U.S. 75 (1947) (upholding Hatch Act prohibition on partisan political activity by federal civil service employees).

Measured against the significance of the government interest at issue here, the infringements of NRSC's associational rights must be deemed marginal. This is especially the case in view of the many alternatives available to NRSC in effecting its rights of association with State committees in spending § 441a(d) funds. NRSC may transfer funds, in unlimited amounts, to State committees for expenditure under that provision, or may hire or otherwise delegate staff to work with and advise NRSC in spending § 441a(d) funds as efficiently or wisely as possible. In upholding various provisions of the FECA in the face of similar First Amendment challenges, the courts have consistently pointed to the availability of alternative means of effecting speech and associational rights. *Bread Political Action Committee v. Federal Election Commission*, [1980] Fed. Elec. Camp. Fin. Guide (CCH) ¶9142 (7th Cir., Dec. 5, 1980); *California Medical Association v. Federal Election Commission*, [1980] Fed. Elec. Camp. Fin. Guide (CCH) ¶9127 (9th Cir., May 23, 1980); *RNC v. FEC, supra.*

Thus, the applicable precedents do not support, and this Court need not review, the NRSC's assertion that its First Amendment rights were impermissibly violated by the Court of Appeals' vindication of the plain language of § 441a(d).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the District of Columbia Circuit

(Decided October 9, 1980)

No. 80-2074

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
Intervenor.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(D.C. Civil Action No. 80-01903)

Before WRIGHT, *Chief Judge*, and WILKEY and GINSBURG, *Circuit Judges.*

Opinion for the court *per curiam.*

Dissenting opinion filed by *Circuit Judge* WILKEY.

PER CURIAM: This case calls for construction of the Federal Election Campaign Act of 1971 (FECA) and its 1974

and 1976 Amendments, 2 U.S.C. § 431 *et seq.*[1] Under a provision of the Act that permits the State committees of the political parties to make expenditures on behalf of senatorial candidates,[2] a number of Republican State committees have executed agreements by which they purport to designate the National Republican Senatorial Committee (NRSC) as their agent for purposes of making expenditures up to the legal limits. The Democratic Senatorial Campaign Committee (DSCC) has challenged this practice as contrary to the letter and purpose of the applicable statutory provisions. The DSCC first sought relief by filing a complaint with the Federal Election Commission (FEC), which upheld the legality of the "agency" agreements.[3] Assuming that it must sustain Commission decisions not shown to be arbitrary and capricious, the District Court granted the FEC's motion for summary judgment.[4] Because we believe that both the FEC and the District Court misconstrued the applicable law, we reverse.

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[1] The Federal Election Campaign Act (FECA) of 1971, Pub. L. No. 92-225, 86 STAT. 3, was amended by the FECA Amendments of 1974, Pub. L. No. 93-443, 88 STAT. 1263, by the FECA Amendments of 1976, Pub. L. No. 95-216, 91 STAT. 1655, and by the FECA Amendments of 1979, Pub. L. No. 96-187, 93 STAT. 1339. The relevant provisions of the Act are hereinafter cited to the United States Code only; section references are all to Title 2.

[2] 2 U.S.C. § 441a(d)(3). The section also authorizes expenditures on behalf of House candidates.

[3] The Commission decision in this case, which it designated as Matter Under Review (MUR) 1234, issued on July 10, 1980.

[4] The decision of the District Court, rendered August 28, 1980, is printed in the Joint Appendix (JA) at 157.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. *Agency Agreements*

The Federal Election Campaign Act, as amended, imposes limitations on campaign contributions and expenditures by individuals and by various kinds of political committees. Section 441a(d)(3), the provision centrally at issue in this case, provides for campaign spending by State and national committees of the political parties:

> (3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate * * * which exceeds—
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> * * * * *
>
> (i) 2 cents multiplied by the voting age population of the State * * *.

Although phrased in restrictive terms, Section 441a(d)(3) is in fact a grant of permission: It permits the national and State committees to make expenditures that would otherwise be prohibited.[5]

As it has done in each campaign since 1976, the Republican National Committee has designated the NRSC as its agent, authorized to make the expenditures permitted to the national committee by Section 441a(d) in all senatorial elections.

Various State committees of the Republican Party have also designated the NRSC as their agent under Section 441a(d). As in the case of the national committee, their agency agreements purport to transfer to the NRSC spending authority

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[5] *See* brief for appellee at 10 n.5 ("Absent § 441a(d), party committees could make no expenditures whatsoever in connection with the Congressional campaigns of their party's candidates.").

conferred under Section 441a(d)(3).[6] In the 1978 senatorial elections, during which the State committees commissioned the NRSC as their agent for the first time, the NRSC spent a total of $2,770,995 under the combined spending authority of the national and State party committees.[7] Most of the money went into 12 closely contested races, in which the NRSC spent $2,180,499. Of this sum, $1,106,286.60 was attributable to its expenditures as agent for the national committee, the remaining $1,074,213.40 to expenditures as agent of various State committees.

Agency agreements related to 1980 contests purport to authorize the NRSC to spend even larger sums. There are Senate races in 34 States, whose 34 Republican State committees have a composite spending ceiling of $3,487,020.80 under Section 441a(d)(3).[8] A number of these State committees have designated the NRSC as their authorized spending agent. In California alone, the NRSC will be able to spend up to $485,-024 as the agent of the State committee, and a total of $970,-048 in its capacity as dual agent of the State and national committees. In New York the comparable figures are $379,717.12 and $759,434.24.

B. *Proceedings Before the Federal Election Commission*

On May 9 of this year the Democratic Senatorial Campaign Committee filed a complaint with the Federal Election Commission in which it challenged the legality of the agency

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[6] A sample "agency" agreement, pursuant to which the Alabama Republican Executive Committee designated the National Republican Senatorial Committee (NRSC) as its agent for making the senatorial campaign expenditures authorized by § 441a(d)(3), appears as Appendix B to the brief for intervenor NRSC.

[7] JA 105.

[8] JA 106.

agreements entered by the NRSC and the various Republican State committees.[9] In its accompanying memorandum of law,[10] the DSCC argued that the challenged arrangements violate the plain meaning of Section 441a(d)(3), which provides separate spending limits for State and national party committees and makes no reference to agency. The DSCC claimed that a clear purpose of the statutory scheme was to create an incentive to the development of vigorous State party organizations. The DSCC did not challenge the agency agreement between the NRSC and the Republican National Committee, since the FEC at that time interpreted a Commission regulation, 11 C.F.R. § 110.7, to authorize such agreements.[11] Moreover, the DSCC itself has made an agency agreement with the Democratic National Committee.

The Commission dismissed the complaint. Although it gave no reasoned explanation of its decision, the FEC acted after receipt of a report from its General Counsel.[12] The "First General Counsel's Report" stated that this was the third time that a complaint of this kind had come before the Commission. Although it recommended the same result that the FEC had reached in the prior cases, [13] the report suggested that the

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[9] The complaint is reprinted at JA 1-9.

[10] Reprinted at JA 19-28.

[11] In fact, the regulation authorizes agency agreements only in presidential campaigns. The FEC has since conceded its interpretive error. *See infra.*

[12] First General Counsel's Report, July 8, 1980, reprinted at JA 46-57.

[13] The FEC had decided the prior cases, designated MUR 780 and MUR 820, in response to complaints about NRSC spending pursuant to "agency" agreements during the 1978 campaigns. The decision in MUR 780 came in response to a complaint by the National Committee for an Effective Congress concerning expenditures during the Montana senatorial campaign of Larry Williams; the FEC apparently acted *sua sponte* in initiating the MUR 820 inquiry into the financing of the senatorial campaign of James Martin of Alabama. The Commission did not come to a decision on either MUR 780 or MUR 820 until after the election. *See also infra.*

General Counsel's emphasis shifted over the course of the various proceedings.[14] In the first proceeding the General Counsel had attributed importance to the absence of any express statutory prohibition of agency arrangements. In this case, however, the General Counsel placed greater reliance on an inference of congressional intent apparently drawn from a related section of the Federal Election Campaign Act, Section 441a(a)(4). That provision allows for unlimited transfers of money between and among political committees of the same party, as defined by the statute.[15] Assuming that the NRSC was a committee of the Republican Party within the meaning of Section 441a(a)(4), the General Counsel reasoned that, because the NRSC could lawfully transfer money to the State committees, which the State committees could then spend up to a limit of 2 cents per resident of voting age, the statute must have intended that the NRSC could itself make expenditures up to that limit while acting as the agent of the State committees.[16] The General Counsel also cited the more general argument that the provision permitting expenditures by the State and national party committees was intended to be "broad"—broad enough to permit the pooling of large numbers of small contributions made to the political parties and their various committees. After receiving the General Counsel's report on July 8, the Commission rendered its judgment on July 10.[17] By a vote of 6-0 it found "no reason to believe" that the NRSC's agency agreements with the State committees violated

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[14] First General Counsel's Report, *supra* note 12, at 4-5, JA 49-50.

[15] Section 441a(a)(4) provides in pertinent part:

> The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party. * * *

[16] *See* First General Counsel's Report, *supra* note 12, at 5, JA 50 (quoting MUR 820) and 8, JA 53.

[17] JA 58.

Section 441a(d)(3). The FEC's summary announcement of the decision did not explicitly adopt the report of the General Counsel.[18]

C. *Proceedings Before the District Court*

The DSCC sought District Court review of the FEC's action.[19] Its petition, filed July 30, 1980, requested a declaratory judgment that the FEC's decision was "contrary to law," on the theory that Section 441a(d)(3) precludes the State committees from assigning their spending limits to the NRSC. Ruling on cross-motions for summary judgment, the District Court decided in favor of the FEC on August 28. The court held that the FEC must prevail unless its action was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law."[20] Judge June Green found no violation of that standard. The District Court construed the decision of the FEC as resting on the inference, advanced by the General Counsel, that the transfer of funds provision of Section 441a-(a)(4), when read in conjunction with Section 441a(d)(3), revealed a congressional willingness to treat the funds and expenditures of various party committees, including the NRSC, as essentially interchangeable.[21] The DSCC docketed an appeal in this court on September 4, 1980. The NRSC moved to intervene on September 19, and the court agreed to the intervention.

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[18] *See id.* The failure to incorporate the First General Counsel's Report was in accord with usual FEC procedures. *See infra.*

[19] Jurisdiction for review in the District Court is provided by 2 U.S.C. § 437g(a)(8). The District Court summarily denied a motion to intervene filed by the NRSC.

[20] *Democratic Senatorial Campaign Committee v. FEC*, D. D.C. Civil Action No. 80-1903, Aug. 28, 1980, memorandum opinion at 3, JA 159.

[21] *Id.*

II. STANDARD OF REVIEW

The District Court regarded the decision of the FEC as entitled to extreme deference. We approach the matter differently.

Although a court should undertake only "a very limited review of the exercise of the FEC's discretionary decisions," *In re Carter-Mondale Reelection Committee, Inc.*, ____ F.2d ____, ____ (D.C. Cir. No. 80-1841, decided September 12, 1980) (slip opinion at 15), we deal in this case, not with a discretionary exercise of Commission power, but with an interpretation of a federal statute. The Supreme Court has long recognized that "the courts are the final authorities on issues of statutory construction" and need not "rubber-stamp" administrative decisions that misinterpret a federal statute. *SEC v. Sloan*, 436 U.S. 103, 118 (1978) (*quoting Volkswagenwerk v. FMC*, 390 U.S. 261, 272 (1968), and *NLRB v. Brown*, 380 U.S. 278, 291 (1965)).

We recognize that special deference to an agency's interpretation of its governing statute is often appropriate. *Cf. Gelman v. FEC*, ____ F.2d ____, ____ (D.C. Cir. No. 80-1646, decided July 18, 1980) (slip opinion at 9). But the Supreme Court has established that an agency's entitlement to deference depends upon the quality of its determinations.[23] Factors to be considered include " 'the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements.' " *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n.5 (1978) (*quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Measured against this standard, the Commission's performance in the matter before us fails to merit the court's substantial deference.

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[23] *Compare Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971), *with Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 92-96 (1973), *and General Electric Co. v. Gilbert*, 429 U.S. 125, 140-143 (1976).

First, the Commission has presented no reasoned explanation of its decision. It merely pronounced that it found "no reason to believe" that the NRSC violated the Act in making expenditures as agent of the national and State committees.[23] We are not even certain whether the Commission endorsed the reasoning of its General Counsel, since the Commission's decision did not explicitly adopt the General Counsel's report and the Commission's own newsletter, the *FEC Record*, has avowed that Commission actions "are not necessarily based on, or in agreement with, the General Counsel's analysis."[24]

Second, even if we were to accept the analysis of the General Counsel as that of the Commission, we would still encounter a troubling absence of consistent reasoning. On two prior occasions, the first January 19, 1979 and the second June 17, 1979, the FEC upheld the legality of NRSC-State committee agency agreements. In those cases, as in the case at bar, the FEC file apparently included a General Counsel's report recommending approval of the challenged agreements.[25] From report to report, Counsel's grounds for his recommendation shifted perceptibly.

In the first case, the General Counsel rested on the absence from the text of Section 441a(d)(3) of an explicit prohibition of agency agreements and on a reading of Section 441a-(a)(4) that would permit unlimited transfers of funds from NRSC to the State committees. *See* First General Counsel's Report, *supra*, at 4, JA 49.

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[23] This bare pronouncement reflects consistent Commission practice. After concluding a case the FEC places the relevant documents, including staff reports and recommendations, in a public file. The Commission does not endorse the reasoning of its staff, nor does it offer reasons of its own. *See* Note, *The Federal Election Commission: The First Amendment and Due Process*, 89 YALE L. J. 1199, 1211-1212 (1980).

Failure to adhere to accepted standards of reasoned decisionmaking not only undermines public confidence but may actually impair the substantive quality of the Commission's performance. *See id.* at 1211. It also deprives a reviewing court of any Commission record on which to base a deferential consideration.

[24] *FEC Record*, Oct. 1979, at 4.

[25] The FEC has not supplied copies of those reports. The First General Counsel's Report in the present case, however, refers back to the earlier reports.

In the second proceeding he added a new justification, arguing that a recently promulgated regulation, 11 C.F.R. § 110.7, permitted the national committee of a political party to designate any agent for the purpose of making Section 441a(d)-(3) expenditures. Because the goal of that regulation was to promote coordination among party committees, the Counsel reasoned that the State committees should also be permitted to designate spending agents under Section 441a(d)(3). *See* First General Counsel's Report, *supra*, at 5, JA 50.

The present litigation has evidenced three more changes in the position of either the General Counsel or the Commission. First, and most important, the Commission brief in this court disavowed the heavy reliance that the General Counsel once placed on a provision of 11 C.F.R. § 110.7. *See* brief for appellee at 9-12. Because the section relied upon, Section 110.7(a)(4), authorizes agents only in connection with presidential campaigns, not congressional contests, the FEC has now conceded that prior citations to the section to sustain the designation of agents in Senate races seriously misconstrued the regulation. Nonetheless, the misconstruction appeared in the First General Counsel's Report made public at the time of the Commission's decision in this case.

In a second significant change, the General Counsel retreated from any substantial reliance on the absence of an express agency prohibition in the text of Section 441a(d)(3). First General Counsel's Report, *supra*, at 4, JA 49. Third, and finally, the General Counsel's report presented a new argument to justify the legality of agency agreements. Once again relying primarily on Section 441a(a)(4), the Counsel appended the corollary claim that congressional failure to amend that section to prohibit transfers of funds by the NRSC constitutes implicit ratification of the Commission's position. *Id.* at 8-11, JA 53-56.

These alterations in grounds for the agency's decision do not warrant our rejection of any individual argument proffered by the General Counsel or the Commission. We are prepared to consider each, in its turn. But the Counsel's shifting positions offer no adequate support for a claim that the Commission's position here is a product of thorough consideration, careful

deliberation, and secure judgment. We must decide for ourselves whether the action of the Commission was "contrary to law."[26]

III. EXPENDITURE LIMITATIONS UNDER SECTION 441a(d)(3)

The agency agreements executed by the Republican State committees and the NRSC purport to transfer spending authority conferred by Section 441a(d)(3). Our inquiry into the permissibility of such agreements begins with examination of the statute itself.[27] Accepted principles of construction establish

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[26] The dissent makes two distinct points concerning the respect the Commission's decision should command. First, the Commission is entitled to deference in construing its own statute. *See* dissenting op. at 1. Second, the court should refrain from upsetting an arrangement supported by "precedent established over the lifetime of the practice." *Id.* at 10. The dissent does not weight, indeed it does not mention, the failure of the FEC to provide a consistent, reasoned explanation of the position it has taken. Moreover, the dissent's reliance on "established" precedent hangs by a slender thread. Commission decisions relevant to this case are of recent vintage. Judge Wilkey recites Commission precedent in four numbered paragraphs. *See* dissenting op. at 10-11. Only one of the recitations is squarely in point. The first three paragraphs relate to Commission expressions on delegations by the *national* rather than the State committees. The fourth paragraph invokes the FEC decisions in MURs 780 and 820, the only precedents directly on target. But neither of these matters was decided until 1979. Prior to the District Court opinion in this case, *no* judicial precedent existed. When Congress expressly provides litigants with a right of judicial review, it is not open to the court to shirk its responsibility by invoking an intervenor's reliance on a short course of unreviewed agency actions.

[27] Intervenor NRSC appears to believe that we are not entitled to reach this question, being bound instead to hold for the FEC under principles of *res judicata* and collateral estoppel which NRSC contends forbid our hearing the case. *See* brief for intervenor at 10. We are of the view that claim and issue preclusion principles are inapplicable to the present case. Where, as here, the statute provides for judicial review, an agency's decision on a question of law does not control the judgment of an Article III court. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 131, comments a and d, at 32-33, 39 (Tent. Draft No. 7 1980) ("[An] agency determination is no more res judicata in [a judicial] review proceeding than is a trial court judgment res judicata in an appellate court in which it is under appeal.").

the presumption that the terms of statutes are ordinarily intended to carry their plain meaning. *See SEC v. Sloan, supra; Caminetti v. United States*, 242 U.S. 470 (1917); *March v. United States*, 506 F.2d 1306 (D.C. Cir. 1974).

The relevant language of Section 441a(d)(3) authorizes "the national committee of a political party, or a State committee of a political party, including any subordinate State committee," to make "any expenditure" of up to 2 cents per voting-age resident on behalf of the party's senatorial candidate. The operative terms are plain and precise. There is no suggestion that Congress chose its language loosely. Section 441a(d)(3) not only designates spending limits with mathematical rigor; it also confers authority to reach those limits on two named committees, both clearly identified by statutory definitions. Section 431(14) defines the "national committee" as "the organization which, by virtue of the by-laws of a political party, is responsible for the day-to-day operation of such political party at the national level." Section 431(15) defines a "State committee" as "the organization which, by virtue of the by-laws of a political party, is responsible for the day-to-day operation of such political party at the State level."

It is obvious that the NRSC is neither the "national" nor a "State" committee of the Republican Party within the contemplation of Section 441a(d)(3). Nor do we understand either the FEC or the NRSC to contend that the NRSC qualifies as a "subordinate committee of a State committee," the third kind of committee to which Section 441a(d)(3) refers. Nor, finally does the statute make reference to any other kind of permissible arrangement by which the State party organizations might convey their spending authority to any other organization. The plain language of the statute thus seems to preclude any arrangement by which the special authority of a named entity is transferred to another.[28]

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[28] The dissent, like intervenor NRSC but unlike the FEC, argues that First Amendment rights of speech and association would be violated if § 441a(d)(3) were construed to deny the capacity of State committees

(Continued on following page)

In its brief as an intervenor in this court, NRSC urges the contrary inference. In so doing, it rehearses an argument invoked by the Commission's General Counsel in an earlier case, the same one on which the General Counsel no longer places substantial reliance. *See* First General Counsel's Report, *supra*, at 4, JA 49. According to the NRSC, this court should infer that agency agreements are permissible under Section 441a(d)-(3) because the statutory text includes no express prohibition of agency relationships. The NRSC's argument depends for its plausibility on its use of "agency" terminology. The language of Section 441a(d)(3) presumably does not prohibit a State political committee's employment of an agent in the standard legal sense; the failure of the statute to mention agency does not, for example, mean that the State committees may not hire staff authorized to act in their behalf. Against this background of familiar usage, however, it is somewhat misleading to characterize the challenged relationships between the State committees and the NRSC as ones of "agency." The State

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Footnote continued—

to assign their statutory authority to the NRSC. Reliance for this argument is placed on *Buckley v. Valeo*, 424 U.S. 1 (1976). That decision held unconstitutional limitations on independent expenditures by individuals and non-party associations in election campaigns. The Court addressed and upheld expense ceilings on national and State party committees only in the context of the Fifth Amendment challenge there made. 424 U.S. at 58-59 nn. 66, 67. But as the FEC notes, brief for appellee at 10 n. 5, independent expenditures are not at issue here: "Party committees * * * are deemed incapable of making independent expenditures in connection with the campaigns of their party's candidates." *Cf.* 2 U.S.C. § 441(a)(7)(B)(i) (and expenditure made "in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate.").

Nor do we understand NRSC to suggest in this case that it has made independent expenditures on behalf of candidates, expenditures of the kind the *Buckley* Court found to be constitutionally protected. And surely no frontal attack has been made by NRSC on the constitutionality *vel non* of expenditure limitations imposed on party organs.

committees do not, in the role of principal, raise and transfer funds to the NRSC as agent; nor do they give any direction as to how "their" funds ought to be spent. Rather, the NRSC raises and spends money as it sees fit; the State committees interact with the NRSC only in the initial agreement to the arrangement. Thereafter the State committees serve as legal shells. We cannot believe that Congress intended the language of Section 441a(d)(3) to authorize artificial relationships of this kind.

We are buttressed in our reliance on the clear language of Section 441a(d)(3) both by the provision's statutory context and by legislative history. The NRSC and its parallel congressional campaign committees were familiar to the Congress that adopted Section 441a(d)(3). Indeed, Congress specifically provided for such committees in Section 441a(h), which permits "the Republican or Democratic Senatorial Campaign Committee, or the national committee of a political party, or any combination of such committees" to make direct contributions of up to $17,500 to senatorial candidates, "notwithstanding any other provision of this Act."[29] If Congress had similarly intended for the NRSC to share in the spending permissions of Section 441a(d)(3), it is not unreasonable to think that Congress would have said so explicitly, or at least signalled its intention in the course of its deliberations.

Yet the legislative history gives no hint that Congress ever foresaw, much less intended, that delegations of spending authority under Section 441a(d)(3) might be attempted. On

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[29] Appellant Democratic Senatorial Campaign Committee argues that the language of § 441a(h) by its own force prohibits any "agency" agreements that lead to NRSC expenditures of more than $17,500 in any single Senate race. *See* brief for appellant at 18-20. In its view, § 441a(h) exhibits clear congressional intent to limit NRSC expenditures to this amount. Because we rest our holding on the plain language of § 441a(d)(3) itself, we need not decide whether § 441a(h) implies a limitation on § 441a(d)(3) or any other provision of the Act.

the contrary, during the 1974 legislative debates Senator Brock noted with concern that the Act and its proposed Amendments failed to provide more permissive treatment to the congressional campaign committees.[30] Though he was fully aware of the proposed Section 441a(d)(3) permission for expenditures by the national and State committees—and in fact mentioned it during his remarks—Senator Brock proposed a further amendment that would have exempted congressional campaign committees like the NRSC from the Act's expenditure limits. "I offer this amendment," he said, "because I do not believe that as the bill is written [the congressional campaign committees] could literally operate in support of our candidates under the existing language."[31]

The Senate initially adopted the amendment offered by Senator Brock, but reversed itself five days later.[32] The record of the Senate debate leading to repeal of the Brock amendment is equally revealing. With the attention of the Senate again riveted on the status of the congressional campaign committees under the Federal Election Campaign Act, not a single Senator ever suggested that the NRSC or any similar committee might be able to assume the spending authority of the State committees. Moreover, the 1974 debates evidence a congressional distinction between the political parties, whose role in the political process Congress sought to strengthen, and the campaign committees of the House and Senate. Senator Clark, who led the fight to repeal the Brock amendment, spoke to this point explicitly. "No one," he said, "should confuse national political parties, supported as they are by thousands of people giving in $5 and $10 amounts, with the Senate and House Campaign Committees."[33]

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[30] 120 Cong. Rec. S5189-S5191 (daily ed. Apr. 3, 1974).

[31] *Id.* at S5189.

[32] *Id.* at S5411-S5415 (daily ed. Apr. 8, 1974).

[33] *Id.* at S5411.

Thus, no more in the legislative history than in the language of Section 441a(d)(3) do we find support for the kind of transfer of statutory authority at issue in this case.[34]

IV. RELEVANCE OF THE TRANSFER PROVISION

The FEC argues that since Section 441a(a)(4) permits the NRSC to transfer unlimited funds to the State committees, it would be "placing form over substance" to forbid the State committees to designate NRSC as their agent. Brief for appellee at 17. We do not address the question whether NRSC may freely transfer funds to State committees under Section 441a-(a)(4), because that issue was not joined before this court. While not conceding the validity of such transfers,[35] DSCC does not now challenge transfers of funds from NRSC to the State committees, apparently because no such transfers have ever been made.

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[34] Appellee purports to find evidence of congressional support for its construction of § 441a(d)(3) in the failure of Congress to enact legislation that would have prohibited explicitly any "movement of funds" between State political committees and congressional campaign committees such as the NRSC. *See* brief for appellee at 14-15. The evidence is entirely unpersuasive. First, post-enactment legislative history has very limited utility in statutory construction, *see SEC v. Sloan*, 436 U.S. 103, 120-122 (1978), and in no case could it change the intent of the Congress that passed the statute. *See Regional Rail Reorganization Cases*, 419 U.S. 102, 152 (1974). Second, the House never actually rejected the bill on which appellee relies, but instead refused to consider the measure on its merits. *See* 124 Cong. Rec. H2261-H2269 (daily ed. Mar. 21, 1978). Third, even within the bill the transfer provision was relatively minor; it is at best unclear that the vote to deny legislative consideration on the merits was motivated by opposition to any particular section. Fourth, the House debate and vote occurred before any FEC decision upholding the legality of agency agreements between State committees and the NRSC under § 441a(d)(3). Fifth, and most important, the proposed ban on the transfer of funds, even had it been adopted, would not speak directly to the issue in this case. Our question involves the legality of an arrangement by which a State committee purports to assign its statutory spending rights to the NRSC, not the legality of a fund transfer.

[35] We have some doubt about whether § 441a(a)(4) encompasses the congressional committees at all. In order to fall within that section the congressional committees would have to be either "national * * *

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We are not convinced, however, that an outright transfer of funds from NRSC to a State committee would be equivalent to an "agency" relationship in which the agent, NRSC, controls the funds from start to finish—from raising to spending. In the latter situation the State committee may have no voice in the way funds are spent. Nor is this a difference that is obviously without consequence. When the NRSC pays the piper, it will call the tune. The candidate may have little incentive to communicate with the State committee, preferring to deal with a committee of his colleagues that directs the flow of funds.

If funds were actually transferred to the State committees, on the other hand, the committees would be more likely to maintain an active role throughout the campaign. Even if NRSC attempted to direct how transferred funds were to be spent, the State committees would actually make the day-to-day campaign expenditures and might be able to persuade NRSC that funds should be spent differently than the congressional committee envisioned. As State committees assumed responsibility for campaign disbursements, moreover, candidates might confer more closely with those committees and remain more closely in touch with their local party constituents. Since the structure of the Act suggests that Congress intended to increase the role of State and national committees, not of congressional committees, we find these possible differences to be potentially meaningful.[36]

Footnote continued—

committees * * * of [a] political party" or subordinate to such a committee. Section 431(14) defines "national committee" in a manner that the parties agree excludes congressional committees. We do not know whether the congressional committees could establish that they are subordinate to the national committees of their parties.

[36]The dissent argues that the same number of dollars will be raised by the NRSC and spent in the same State senatorial campaign, regardless of whether the NRSC is permitted to act as the agent of the State committees, dissenting op. at 9, and that this factor is all that matters in terms of "substance." The dissent thus fails to consider the possible importance of State committee *control* of finances in strengthening

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It would be inappropriate for this court to speculate further about the ways in which transfers of funds might differ from agency agreements. The parties have not argued the validity of funds transfers, but only of agency agreements. Since we find that the plain language of Section 441a(d)(3) precludes the latter,[37] we must reverse the District Court, declare the Commission's failure to act contrary to law, and direct the Commission to conform with this decision forthwith. *See* 2 U.S.C. § 437g(a)(8)(C).

So ordered.

WILKEY, *Circuit Judge*, dissenting: Like Chief Judge Wright and Judge Ginsburg, I too have read the statute and base my opinion as to the necessary result in this case on its plain language. Unlike my colleagues, however, I do not approach the task of this court as if we are the first called upon to construe this statute; the issue before us is not our construction of the statute *de novo*, but whether the Commission's interpretation of the statute can be supported on a rational basis so that its conclusion cannot be said to be "contrary to

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Footnote continued—

the influence of the State committees and encouraging candidates to communicate more closely with their State party constituencies. Nor is the dissent even consistent in its claim that the court's decision exalts form over substance. Having argued at length that our opinion will not alter the "substance" of campaign finance, the dissent then proceeds to claim that the result will be more sweeping than even the plaintiffs had "bargained for." *Id.* at 8. The court, the dissent argues, should not upset a method of campaign financing that the NRSC has found to have "some functional advantage." *Id.* at 9. Yet the location of such a "functional advantage" in a senatorial campaign committee, rather than in the national or State committees, is a result that Congress showed no desire to achieve.

[37] Like the Commission, the dissent fails to come to grips with the only real issue in this case: may party organizations effectively rewrite § 441a(d)(3) of the Act to displace State committees and substitute congressional campaign committees in their stead? For the reasons stated in our opinion, the clear answer to this question is "no."

law."[1] Also unlike my colleagues, I reach a result supported by the General Counsel of the Federal Election Commission, the unanimous 6 to 0 vote of the Members of the Commission, and the decision of the District Judge below.[2]

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[1] 2 U.S.C. § 437g(a)(8)(C) (1976) and subsequent amendments.

The statutory standard for judicial review requires the court to overturn a Commission interpretation of its implementing statute which is "contrary to law." *Id.* § 437g(a)(8)(C). The Federal Election Campaign Act delegates to the Commission especially broad discretion to set election law policy and to draw the meaningful distinctions appropriate to definitions under the election law. *E.g.*, 2 U.S.C. § 437c(b)(1), *as amended by* Pub. L. No. 96-187, § 306(b)(1), 93 Stat. 1335 (1979): "The Commission shall administer, seek to obtain compliance with, and *formulate policy* with respect to, this Act," (emphasis added); 2 U.S.C. § 431(14)–(15): "The[se] term[s] . . . mean[] . . . , *as determined by the Commission*" (emphasis added).

[2] *Democratic Senatorial Campaign Committee v. FEC*, No. 80-1903 (D.D.C. 28 Aug. 1980).

The penchant of this court to give no deference whatsoever to the responsible agency's interpretation of its role and basic statute has been noted with acerbity by the Supreme Court in *Vermont Yankee Nuclear Power Corp. v. NRSC*, 435 U.S. 519 (1978) and by commentators, *e.g.*, Scalia, *"Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court,"* 1978 S. CT. REV. 345, 358, 371. Deference to the Commission on new issues like this before a new agency gives the agency the chance it needs to make its own interpretation, because it has the responsibility to make its statute work. *Power Reactor v. Electricians*, 367 U.S. 396, 408 (1961). Deference to the Commission's view on election law policy and what constitutes compliance seems particularly advised in that events occur very quickly in an election year. The Commission is the expert body charged by Congress with the coherent administration of elections and must, therefore, be competent to reach expeditious and equitable judgments drawing reason out of a melange of vaguely consistent election laws obviously adopted by the process of political compromise on this highly charged political field; it is the Commission which is prepared to read the body of election law as a whole. Moreover, the Commission is self-consciously bipartisan. Congress created a Commission, 2 U.S.C. § 437c (1976), which could make sensitive political decisions cognizant of bipartisan exigencies. Courts should tread lightly on these matters of party politics.

I. STRAIGHT STATUTORY CONSTRUCTION

We start with 2 U.S.C., Ch. 14—Federal Election Campaigns,[3] § 441a, *Limitations on Contributions and Expenditures.* There are *two* subsections—not just one—relevant and decisive in this case.

a. *Dollar limits on contributions.*

. . .

(4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party.

. . .

(d) *Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office.*

. . .

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State Committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

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[3]The Federal Election Campaign Act of 1971 (FECA), Pub. L. No. 92-225, 86 Stat. 3, was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475, by the Social Security Amendments of 1977, Title V, Sec. 502, Pub. L. No. 95-216, 91 Stat. 1655, and by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339.

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner of any other State, $10,000.

The latter of the two above provisions, (d)(3), fulfills one of the two prime objectives of the Federal Election Campaign Act—to place a limit on overall expenditures in campaigns for federal office. For my colleagues this provision is sufficient unto itself to settle the question before us in this case. For me it is not sufficient, because this section alone does not purport to tell us where the money, whose total amount is limited, is coming from.[4] To find out that we must look back at the first part of § 441a, *Limitations on Contributions and Expenditures*, to the very first subsection: (a) *Dollar limits on contributions*. Subsections (1), (2), and (3) deal with limits on contributions by persons, multi-candidate political committees, and individuals, provisions which are directed to the second principal objective of the FECA, *i.e.*, eliminating undue and corrupting political influence on candidates and office-holders by limiting contributions. The subsections dealing with persons, multi-candidate political committees, and individuals are not relevant to this case, but subsection (a)(4), quoted above, certainly is.

Subsection (a)(4), far from placing any limitation, specifically provides that the prior limitations in (1) and (2) (persons and multi-candidate political committees) "do not apply to

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[4]The majority, maj. op. at 12-16, appears to be singularly concerned with *who* may spend money under FECA rather than from *where* campaign money may lawfully flow. The transfer provision, 2 U.S.C. § 441a(a)(4), indicates strong legislative intent that campaign monies flow freely through a political party's extended network. Plainly, Congress thought to permit the discretionary assignment of funds among a party's component organizations.

transfers between and among political committees which are national, State, district or local committees (including any subordinate committee thereof) of the same political party." As will be discussed more fully under IV below, while there are evils associated with large contributions by persons and multicandidate political committees to candidates for federal office, there are no visible evils associated with the transfer of funds among committees of the same political parties. The contribution limitations as to the original sources have already been applied, and the connection between the recipient federal candidate and the original source of the funds is totally broken and obscured.[5]

So looking again at subsection (d)(3), we might expect that the national committee of each political party, or a state committee of a political party, would gain a substantial amount of contributions from persons generally, and would employ those funds most efficiently to assist the candidates for Senator or Representative in each State as its judgment indicated—but within the overall limit on expenditures as provided by subsection (d)(3). However, in addition to the contributions of persons or other authorized entities, which are limited by §§ 441a(a)(1), (2), and (3), these party national and state committees have an additional source of funds, and that is a transfer of funds from one of the "political committees which are national, State, district, or local committees . . . of the same political party" under subsection (a)(4). These transfers are plainly unlimited in amount, because the funds have been accumulated in obedience to the contribution limits of § 441a-(a) and there is no visible evil in the transfer of funds among political committees of the same party, if both the individual contribution limits and the overall expenditure limits on any campaign race are observed.

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[5] *See* notes 7-18, 25 *infra* & accompanying text. *See also Common Cause v. Schmitt*, Nos. 80-1609 & 80-1754 (D.D.C. 30 Sept. 1980) (three-judge court) at 18 & n. 40.

The Senatorial Campaign Committee and the Congressional Campaign Committees of each major political party have proved to be highly successful fund-raisers. The plaintiff Democratic Senatorial Campaign Committee does not challenge in this suit that under § 441a(a)(4) either a Senatorial Campaign Committee or a Congressional Campaign Committee of either party *can transfer* an unlimited amount of money to either that party's national committee or that party's state committee in one of the individual states, and that the money so transferred can be expended on behalf of that party's candidate for either the Senate or the House in a given state—all within the expenditure limit of (d)(3).

However, for reasons which are not obvious in the record and which are immaterial, the Senatorial and Congressional Campaign Committees of *both* political parties have found it administratively advantageous to make the above-described transfer of funds in an indirect way.[6] Instead of the Senatorial or Congressional Campaign Committee writing its check to the order of the national committee of its party, the Senatorial or Congressional Campaign Committee of both parties has followed the practice of having the national committee *authorize* the Senatorial or Congressional Campaign Committee of its party to make expenditures *as its agent* on behalf of designated candidates for the Senate and the House. Again, such expenditures by a given national committee from all sources must be within the overall limits of subsection (d)(3).

Significantly, and interestingly, this indirect device of appointing the Senatorial or Congressional Campaign Committee as the agent of the *national* committee, a practice followed by both political parties, is *not* challenged by the plaintiff Democratic Senatorial Campaign Committee here. What is challenged is the exact parallel in direct transfer of funds by the authorization of a *state* committee to the Senatorial (or Congressional) Campaign Committee to expend funds on behalf of a designated candidate for the Senate or House of that political

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[6] Counsel for appellant, Democratic Senatorial Campaign Committee, has informed the court that it too is the designated agent of its party's national committee.

party.[7] This delegation of expenditure authority is practiced *only* by the *Republican* Senatorial and Congressional Campaign Committees, but *not* by the *Democratic*. Why this is so we do not know, and it is immaterial to any court decision, because the delegation of authority from the state committee to the Senatorial or Congressional Campaign Committees rests on precisely the same rationale and statutory provisions permitting unlimited transfers as does the delegation of authority from the national committee to the Senatorial or Congressional Campaign Committees, a practice engaged in by *both* political parties.

II. FORM OVER SUBSTANCE

My colleagues say that we are not called upon here to pass upon a transfer case, that there is actually no writing of a check by the National Republican Senatorial Committee to a state committee on behalf of a Senatorial candidate in that state. This is true. The transfer of funds and the transfer of their political effect do not take place in that way; it is done indirectly as described above by the delegation of authority from the state committee to the Senatorial Committee (or from the national committee, unchallenged here).

The difference is purely one of form, not substance. It makes absolutely no difference in the scheme of control of campaign expenditures and contributions whether the National Republican Senatorial Committee in Washington writes a check and mails it to the state committee in Louisville, Kentucky, to be expended for the benefit of the Republican nominee for the Senate in the State of Kentucky, or, on the other hand, as is now the practice, the state committee in Louisville, Kentucky, writes a letter to the Senatorial Campaign Committee in Washington authorizing that committee to make expenditures on behalf of the same Republican nominee for the Senate in Kentucky. In either event, the funds expended come from the contributions accumulated by the Senatorial Committee in Washington, those contributions having been duly made in accordance with the limitations of § 441a(a), and expended within the overall limitations of § 441a(d)(3).

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[7] *Cf.* Maj. op. at 17-19.

It is precisely because to accede to the view argued for by the plaintiff here and espoused by my colleagues would do nothing but exalt form over substance that the Federal Election Commission very sensibly responded in a requested opinion that such delegation of authorized expenditures to the Senatorial or Congressional Campaign Committee of the same party was lawful within the meaning and purpose of the statute. The FEC stated: "Since funds may be transferred between the congressional campaign and the national committee of the same political party without limitation, it is immaterial as to which committee's funds are being expended under 2 U.S.C. § 441a-(d)(3)."[8] There is simply no sense in prohibiting the letter of authorization being written in Louisville and mailed to Washington, when it is recognized that the statute plainly permits under § 441a(a)(4) a check to be written in Washington and mailed to Louisville to accomplish precisely the same purpose, *i.e.*, spending money accumulated by the National Republican Senatorial Committee on behalf of the Republican candidate for Senator in the State of Kentucky.[9]

According to the majority's view, two things will happen: First, the letters of authorization from the state committees to the National Republican Senatorial Committee will become of no effect and the Senatorial Committee in Washington will immediately start writing checks to each state committee for the amount which it has decided to allocate in support of the Republican Senatorial candidates in those states. Secondly—and this is more than the plaintiffs have asked or bargained for —*both the National Committees of the Republican and Democratic parties* will immediately be required to stop writing letters of authorization to their respective Senatorial and Congressional Campaign Committees in Washington; instead,

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[8] Advisory Opinion, AO 1976-108, *reprinted in* Commission Appendix at 3a, *reprinted in* [1980] Fed. Elec. Camp. Fin. Guide (CCH) ¶5236.

[9] There is no question in this case of limitations on *contributions* under 2 U.S.C. § 441a(h) ($17,500 contribution limit imposed on national and Senatorial Campaign Committees). This case involves only the spending of money in campaigns and applicable *expenditure* limits.

the National Committees of both parties will simply have to arrange the direct transfer of funds from their respective Senatorial and Congressional Campaign Committees, as authorized by § 441a(a)(4), and then the National Committees (instead of the Senatorial or Congressional Campaign Committees) will expend those funds within the limits of subsection (d)(3) on behalf of selected candidates for the Senate and House in the states.

The net result of plaintiff Democratic Committee's position prevailing is that not one dollar less will be spent, not one dollar will be changed from where the members of the national committee, or state committee in consultation with the Senatorial or Congressional Campaign Committees of their respective parties, want the dollar to be expended. All that will happen is that the money will be transferred and administered in a manner which *neither* major political party has found most efficient, but which the Federal Election Commission has held is the exact practical equivalent of the practice of authorized delegation now being followed by both political parties.

An obvious question arises: If the respective committees can transfer and spend the money in precise technical compliance with both relevant subsections of the statute, why do not the committees use this form and achieve the same substance? The record is bare of any explanation of why the various committees have followed the current practice, which dates at least from 1976. Both major parties use the method of their respective National Committees authorizing the Senatorial and Congressional Campaign Committees as agents to make expenditures for candidates within the statutory limits. Only the Republicans have seen fit to have their state committees so work with the National Campaign Committees. There may be advantages of economy of scale in expenditures from one source, of available expertise in creating and placing advertisements, in obtaining media exposure, in obtaining credit during the campaign, etc.; the court can only speculate. All we know is that both parties employ the indirect method of expenditure by authorizing the committees in Washington as agents, that it must have some functional advantage, and that the Democratic

Senatorial Campaign Committee (which does not act as an agent for Democratic *state* committees) has taken the trouble to challenge the National Republican Senatorial Committee's actions as agent for Republican state committees.

III. ESTABLISHED PRECEDENT–ACTION AND OPINION

While the advantage of what the intervenor Republican Committee is doing is not obvious from the record, the profound–and grossly unfair–disadvantage of the court sustaining this Democratic Committee challenge at this late hour is undeniably clear. The actions challenged were in accord with the precedent established over the lifetime of the practice of delegation by both the national and state committees, which rest on the same rationale.

(1) In 1976 the Republican National Committee (RNC) designated the National Republican Senatorial Committee (NRSC) as its agent to make the expenditures for congressional campaigns permitted under subsection (a)(4) and (d)(3).[10] The Democratic National Committee filed a complaint challenging this indirect method, but withdrew it.[11]

(2) Representative Cleveland requested an advisory opinion on the practice, which was specifically approved in Advisory Opinion 1976-108, cited above.[12]

(3) At this time the FEC was engaged in rulemaking, and produced § 110.7 *Part Committee Expenditure Limitations* (2 U.S.C. § 441a(d)). Regulation § 110.7(a)(4) specifically approves the *national* committee of a party making any

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[10] *See* Brief for Appellee at 3; Appellant's Brief at 20 n.16; Brief in Behalf of Intervenor, Republican National Senatorial Committee at 3-4.

[11] *See* Brief in Behalf of Intervenor, Republican National Senatorial Committee at 4.

[12] *Reprinted in* Brief for Appellee, Commission Appendix at 3a; [1980] Fed. Elec. Camp. Fin. Guide (CCH) ¶5236.

authorized expenditure under § 441a(d) "through any designated agent" in connection with a presidential campaign. No reference was made to a *state* committee acting through an agent, although both national and state committees are authorized to make expenditures by § 441a(d); the explanation offered is that at that time in 1976 no state committee had made any agency designation in either a presidential or a congressional campaign. Furthermore, it was only in 1978, after the regulation was promulgated, that agency designations were made by state committees to the Congressional Committees in campaigns for House and Senate races.[13]

(4) In 1978 several Republican state committees followed the practice begun in 1976 by the RNC and designated the intervenor National Republican Senatorial (or Congressional) Committee as an agent to make expenditures for the benefit of congressional candidates. This was challenged in two complaints. In MUR 780[14] the FEC concluded on 19 January 1979 that the NRSC had not violated 2 U.S.C. § 441a(d) by making § 441a(d) expenditures as agent of *both* the Montana Republican *State* Committee and the Republican *National* Committee. Likewise, in MUR 820 the FEC concluded on 19 June 1979 that there was no violation of § 441a(d) by the NRSC acting as agent of both the RNC and the Alabama Republican Party.[15] The plaintiff here, the Democratic Senatorial Campaign Committee, did not protest or attempt to overturn these FEC rulings until May 1980 with the filing of this complaint before the FEC.

Surely this was amply reassuring precedent for the intervenor NRSC to continue in this campaign year the practice of acting as agent of the RNC and state committees to make expenditures under §§ 441a(a)(4) and (d)(3), a practice which

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[13] *See* Brief in Behalf of Intervenor, Republican National Senatorial Committee at 4.

[14] *See* Commission files, Matter Under Review, MUR 780 (19 Jan. 1979).

[15] *See* Commission files, MUR 820 (19 June 1979).

had been validated and sustained by the FEC against every challenge since 1976. In reliance thereon the intervenor NRSC has entered into contracts for campaign activities, with the media and political suppliers, and with employees to serve during the campaign. These are substantial commitments of millions of dollars, which this court now throws into jeopardy and confusion 30 days before the campaign is to end, in spite of four years of precedential rulings contra by the responsible agency, the FEC, confirmed in this specific case by the FEC General Counsel's opinion, the unanimous 6 to 0 vote of the FEC members, and the decision of the District Court.

One minor point perhaps should be noted at this time. While counsel for the Democratic Senatorial Campaign Committee responded in answer to a direct question from the court at oral argument that the plaintiff was "not challenging transfers in this case," yet it has been suggested that neither the Democratic Senatorial Campaign Committee nor the National Republican Senatorial Committee (nor their respective Congressional Campaign Committees) are "national" committees within the meaning of § 441a(a)(4) authorizing unlimited "transfers between and among committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party." We can assume the disposition of this case, since no party challenges it, that the Senatorial Campaign Committees are within the scope of the "transfer" provision.[16]

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[16] The broad, inclusive scope of the transfer provision, 2 U.S.C. § 441a(a)(4), the compelling need for Commission discretion, and the congressional contemplation of joint "national committee"/"Senatorial Campaign Committee" activity obvious in 2 U.S.C. § 441a(h), all suggest that any committee of a political party, including a party's Senatorial Campaign Committee, would be free to initiate and receive funds transfers under § 441a(a)(4). The Senatorial and Congressional Campaign Committees are identifiable as, and are in fact, part of either the Republican or Democratic parties. *See* 119 CONG. REC. S5194 (daily ed. 3 Apr. 1974) (remarks of Sen. Baker). Furthermore,

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IV. TWO PRINCIPAL PURPOSES OF THE FEDERAL ELECTION CAMPAIGN LAWS

It is undisputed that two of the principal objectives of reform in the conduct of federal elections were, first, putting some kind of an overall limit on the horrendously escalating cost of political campaigns, and, secondly, eliminating the pernicious influence of the large campaign contributor over the political candidate or political officeholder.[17] These two reform objectives were to be accomplished in three ways: first, overall limits on campaign expenditures in the races for President, the Senate, and the House; secondly, stringent limitations on the individual contributions which could be made by persons and organized entities to individual candidates and special purpose committees;[18] thirdly, a system of full public disclosure of all expenditures and all except the most minor contributions.

When we look at the plain language of the statutory scheme, we see that there are overall limits on the expenditures in campaigns for the Senate and the House under § 441a (d)(3). There is no suggestion whatsoever in the plaintiff's argument or in my colleagues' opinion that the practice challenged here in any way is an attempt to or could evade the

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Footnote continued—

> [t]he conferees also determined that it is appropriate to set a higher limit on contributions from persons to political committees of national political parties in order to allow the political parties to fulfill their unique role in the political process. In this connection, the term "political committee established or maintained by a national political party" includes the Senate and House Campaign Committees.

H. R. REP. NO. 94-1057 (Conf. Rep.), 94th Cong. 2d Sess. 58 (1976) (discussion of 2 U.S.C. §§441a(a)(1)(b)-(2)(B)).

[17] *See Buckley v. Valeo*, 424 U.S. 1, 25-26 (1976) (per curiam).

[18] Controlling campaign contributions, the Supreme Court held in *Buckley v. Valeo*, legitimately suppressed corruption and venal influence by eliminating the possibility of *quid pro quos*.

overall expenditure limitations of subsection (d)(3). It is perfectly clear that whatever funds of the intervenor NRSC, acting as agent of either the Republican National Committee or a state party committee, are expended on behalf of any given Senatorial candidate, those expenditures must be within the overall limits authorized to the RNC or to the state committee, respectively. This is true whether the Senatorial Committee makes the expenditure itself as a result of being designated as an agent of the state or national committee and authorized thereby to make the expenditure, or whether the Senatorial Committee writes a check to either the national committee or the state committee.

Furthermore, accountability for all funds expended on behalf of a given political candidate by any party political committee is placed in the state's party central committee. Regulation § 110.7,[19] *Party committee expenditure limitations (2 U.S.C. 441a(d))* specifically provides under subsection (c)(1): "The State central committee shall be responsible for insuring that the expenditures of the entire party organization are within the limitations, including receiving reports from any subordinate committee making expenditures under paragraph (b) of this section, and filing consolidated reports showing all expenditures in the State with the Commission," The "expenditures under paragraph (b) of this section" refers to the expenditures of "the general election campaign of a candidate for federal office in that state who is affiliated with the party," *i.e.*, a designated Republican or Democratic candidate for the Senate or for the House.

The second principal purpose of campaign reform, limiting contributions in order to eliminate the evil effect of huge contributions influencing candidates or officeholders, is taken care of in § 441a(a), *Dollar limits on contributions.*[20] As was briefly discussed above, after placing specific limits on (1) persons, (2) multi-candidate political committees, and (3) individual aggregate contributions, the Congress came to consider

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[19] 11 C.F.R. § 110.7 (1977).

[20] *See* notes 17-18 *supra* & accompanying text.

the possible and probable "contributions" to be anticipated between political committees of the same political party. These, of course, are not "contributions" in the original sense;[21] they are actually *transfers* of funds which have been received by the respective committees within the contribution limit for individuals and organizations previously set. Hence, the Congress made absolutely clear in § 441a(a)(4) that the limitations on contributions in the above paragraph "do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party."

The reason for this Congressional exemption of transfers between political committees of the same party is perfectly obvious: there is no evil to be prevented by barring the free exchange of funds among political committees of the same party. There is no fear of undue influence exerted by a large contributor over the individual candidate or political officeholder, for two reasons: (1) the individual contributions have originally been limited by the contribution limits in the statute; and (2) the political candidate or officeholder does not know who made the contributions to the overall national, state, district, or local committee which generously endows him with funds, or, at least, he does not know who contributed the specific

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[21] Party committees, including Senatorial and Congressional Campaign Committees, it is worth noting, are deemed incapable of making *independent expenditures* which were accorded great protection in *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Common Cause v. Schmitt*, Nos. 80-1609 & 80-1754 (D.D.C. 30 Sept. 1980) (three-judge court). *See* Brief for Appellee at 10 n.5. 2 U.S.C. § 441a(d) is the only statutory authorization for *expenditures* by party political committees. There is no support for an inference that Senatorial and Congressional Campaign Committees were meant by Congress to be excluded from making *any expenditures* at all in connection with campaigns. It makes more sense that these Campaign Committees should share in their parties' overall expenditure limitations.

dollars which the individual candidate receives.[22] And, no matter by whom or by whose agency the expenditures are made, the expenditures on any candidate's behalf must be within the limits of § 441a(d)(3). Since there was no evil to be prevented by imposing a restriction on transfers, Congress very wisely specifically said that there were no limits on transfers; and, the Federal Election Commission, charged with implementing and enforcing the campaign laws, has very wisely and sensibly said, from the start and consistently thereafter, that the practice of designating another committee as an agent and authorizing expenditures of funds by the agent, when the funds could have been directly transferred anyway, is the equivalent of the transfers specifically authorized by the statute.

Not only is there no evil to be prevented by the limitation which the plaintiff Democratic Committee has persuaded my colleagues to write into statute, but there are positive benefits to be gained by allowing the free interchange of funds among political committees of the same party, whether by direct transfers or indirectly by authorizing another committee to act as agent in making the expenditures. A party cannot "unduly influence" its own candidate, but by supplying funds for the individual candidate it may instill in the candidate some sense of party loyalty and party responsibility, which is generally recognized to be a beneficial relationship. Certainly to the extent an individual candidate is beholden to his own political party for a substantial portion of his campaign funds, he is much less vulnerable to individual pressure groups who would sway his vote, for good or evil, on certain critical issues.[23]

It should not be overlooked that the funds raised by the committees referred to in subsection (a)(4), whose funds are

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[22] *See generally Common Cause v. Schmitt*, Nos. 80-1609 & 80-1754 (D.D.C. 30 Sept. 1980) (three-judge court).

[23] As a Congressman, Judge Abner Mikva, presently a member of this court, argued for the benefits of free transferability of party funds. 124 CONG. REC. H2263 (daily ed. 21 March 1978).

to be freely transferred, are funds raised from citizens all over the United States. To that extent they are an amalgamation, an expression of support from small contributors. In that respect they are similar to the funds raised through the federal tax process by the check-off on individual income tax returns, which is an expression of national policy preferring funds to be raised as anonymously and in as widespread a fashion as possible. To the extent that these funds can be used freely in individual Senate and House campaigns, we are implementing a definite national policy. The position urged by the plaintiff here and adopted by Judges Wright and Ginsburg cuts directly contrary to that salutary policy by eliminating the most effective and efficient method chosen.

V. FIRST AMENDMENT CONSIDERATIONS

It is quite apparent from the lengthy Congressional debates in regard to the federal election laws over a period of years that Congress was quite aware of the fact that, in imposing contribution and expenditure limitations, it was legislating in an area of vital First Amendment concerns. If there was any legislator who was not aware of that, he was surely made aware of it by the Supreme Court's decision in *Buckley v. Valeo*. "The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities."[24]

There is no need to rehash the extensive Supreme Court analysis on the First Amendment grounds in *Buckley*. It is clear that the Court held that construction of the Act must be made in light of First Amendment rights, and so must this court's construction here. It is sufficient to point out that the Supreme Court sustained limitations on individual contributions only because the perceived evil of undue influence by large contributors on candidates and officeholders was sufficient to justify these restrictions. At the same time, the Supreme Court struck down the limitations on individual expenditures on behalf of his own individual candidacy, because the

[24] 424 U.S. 1, 14 (1976).

use of money by an individual is a form of speech protected by the First Amendment, and there could be no evil of undue influence by one man exercising his First Amendment rights.

Similarly, in the case at bar, there is no visible evil in any "undue influence" by a political party on its own nominated candidate for the Senate or House.[25] Hence, there is absolutely no evil to be eliminated by gratuitously imposing a restriction on the free interchange of funds among the political committees of the same political party, so long as those funds are accounted for and the expenditures are controlled by a designated accountable committee within the overall limitations on expenditures for that office. It is illuminating to compare the specific restrictions, which Congress did clearly write into the statute, with the tortuous and convoluted construction which my colleagues find it necessary to engage in to sustain the prohibition against free interchange of funds argued for the plaintiff Democratic Committee.[26] When there is no clear, specific

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[25] *Cf. Common Cause v. Schmitt*, Nos. 80-1609 & 80-1754 (D.D.C. 30 Sept. 1980) (three-judge court) at Part III. A. 4. (political committees, through expenditures rather than contributions, do not pose *quid pro quo* threat).

[26] The First Amendment protects political association as well as political expression. The constitutional right of association explicated in *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), stemmed from the Court's recognition that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee "freedom to associate with others for the common advancement of political beliefs and ideas," a freedom that encompasses "'[*t*]*he right to associate with the political party of one's choice.*'" *Kusper v. Pontikes*, 414 U.S. 51, 56, 67 (1973) quoted in *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975).

Buckley v. Valeo, 424 U.S. 1, 15 (1976) (emphasis added). *See also Common Cause v. Schmitt*, Nos. 80-1609 & 80-1754 (D.D.C. 30 Sept. 1980) (three-judge court) at Part III B.

prohibition against the action complained of, the difficulty of finding the rationale to restrict free speech should be proof positive that my colleagues are engaged in an unworthy effort.

Mark this well. No person, no group of persons (committee) needs the *permission* of any Congress or any court to spend money to assist candidates for public office. That is free speech. There can be limitations and regulations as to amounts, methods, publicity, and accountability, but the validity of those limitations will be strictly tested. The limitation must be justified by the evil which the limitation is designed to prevent, just as we test any other limitation on free speech. In this, as in any other area of free speech, the limitation must be precisely spelled out and clearly relevant to prevention of evil.[27] Neither the plaintiff nor my colleagues have even

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[27] I submit that the majority fails to grasp the significance of what the Supreme Court did in *Buckley v. Valeo*, 424 U.S. 1 (1976), in upholding limits on Contributions, but striking down limits on Expenditures. (*See* maj. op. at n. 27.) *Both* are in the First Amendment area. Where contributions are concerned, the evil of the *quid pro quo* is obvious, so the statutory limits are justified. Expenditures are a different matter, for there is no visible corruption when money amplifies free speech; *hence the Court struck down every limitation on Expenditure challenged on First Amendment grounds.* In so doing the Court spoke in terms relevant to the majority's effort to restrict expenditures here:

> "No governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by § 608(c)'s campaign expenditure limitations.
>
> . . . .
>
> "The interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by § 608(c)'s campaign expenditure ceilings." (p.55)
>
> . . . .
>
> "The interest in equalizing the financial resources of candidates competing for federal office is no more convincing a justification for restricting the scope of federal election campaigns."
>
> . . . .

(Continued on following page)

claimed any evil to be prevented by the restriction they would engraft on the statute. Section 441a(d)(3) is no prohibition on

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Footnote continued—

"There is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate.[64]

[64]As an opinion dissenting in part from the decision below noted: "If a senatorial candidate can raise $1 from each voter, what evil is exacerbated by allowing that candidate to use all that money for political communication? I know of none." 171 U.S. App. D.C., at 268, 519 F.2d, at 917 (Tamm, J.)" [in which this writer joined]. (p. 56)

"The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution, it is not the government, but the people—individually as citizens and candidates *and collectively as associations and political committees*—who must retain control over the quantity and range of debate on public issues in a political campaign.

"For these reasons we hold that § 608(c) is constitutionally invalid." (pp. 57-58)

The Court went on to *validate contribution ceilings*, but "[b]y contrast, *the First Amendment requires the invalidation of the Act's independent expenditure ceiling*, § 608(e)(1), its limitation on a candidate's expenditures from his own personal funds, § 608(a), *and its ceilings on overall campaign expenditures*, § 608(c). These provisions place substantial and direct restrictions on the ability of candidates, citizens, *and associations* to engage in protected political expression, restrictions that the First Amendment cannot tolerate." (Emphasis added.) *Id.* at 58-59.

The specific holding of *Buckley* was, of course, as the majority suggests (maj. op. at n. 27), to invalidate the *independent* expenditure limitations, not to rule on expenditures of a political party committee—a ruling which, if made, would have left one point of view in the case at bar bereft of any support whatsoever. But surely the language used by the Court, the rationale of sustaining restrictions *only* where there was an obvious evil to be prevented, is highly relevant to our problem here. *Buckley* confirms that *all* of FECA's campaign "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." 424 U.S. at 14.

the activities of intervenor National Republican Senatorial Committee, but an overall limit on expenditures for federal elective office and a method of accounting utilizing the respective party national and state committees. The only other relevant provision, § 441a(a)(4), authorizes the intervenor NRSC to do directly what it has done indirectly here. In what the Supreme Court has termed "an area of the most fundamental First Amendment activities," this is a shaky foundation for the decision my colleagues stretch to reach.

APPENDIX B

Opinion of the United States District Court

(Filed August 28, 1980)

Civil Action No. 80-1903

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

DEMOCRATIC SENATORIAL
CAMPAIGN COMMITTEE,
Petitioner,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

MEMORANDUM OPINION

This is an action challenging the dismissal by the Federal Election Commission (the Commission) of a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended (2 U.S.C. § 431 *et seq.*), filed by the Democratic Senatorial Campaign Committee against the National Republican Senatorial Committee. Petitioner Democratic Senatorial Campaign Committee (DSCC) seeks a declaration by this Court pursuant to 2 U.S.C. § 437g(a)(8) that the Commission's determination was contrary to law and an order directing the Commission to comply with such declaration within 30 days.

The DSCC is a political committee organized by Democratic Party members specifically to support Democratic candidates in elections for the United States Senate. The National

Republican Senatorial Committee (NRSC) is a political committee organized by Republican Party members specifically to support Republican candidates in elections for the United States Senate.

The administrative complaint involved was filed with the Commission by the DSCC on May 9, 1980, pursuant to 2 U.S.C. § 437g(a)(1). The allegations of the complaint concerned the practice of various state committees of the Republican Party authorizing the NRSC to make expenditures which the state committees were entitled to make in connection with general election campaigns for the United States Senate under 2 U.S.C. § 441a(d). By written agreement, the various state committees had designated the NRSC as their "agent" in 1978 for the purpose of making such expenditures.

The complaint asserted that the NRSC was prohibited by the statute from acting as the agent of the various state Republican Party committees under 2 U.S.C. § 441a(d).

DSCC did not challenge the fact that the NRSC had been designated as the agent of the national committee of the Republican Party in making § 441a(d) expenditures on behalf of Republican senatorial candidates. Rather, it challenged only the ability of the state committees to designate NRSC as their agent in making § 441a(d) expenditures. The matter had been considered and rejected by the Commission in two previous cases; i.e., *Friends of Donald Stewart Committee v. NRSC*, MUR 820, and *National Committee for an Effective Congress v. NRSC*, MUR 780.

Pursuant to 2 U.S.C. § 437g, the Commission, which is vested with exclusive jurisdiction for administration and civil enforcement of the Act, *see* 2 U.S.C. § § 437c(b)(1), 437d(e), gave the NRSC an opportunity to demonstrate that no action should be taken against it by the Commission. NRSC submitted a written response to DSCC's complaint.

On July 11, 1980, the Commission adopted the recommendation of its General Counsel and determined by 6-0 vote

that there was no reason to believe the NRSC had violated the Act. Accordingly, it dismissed the complaint, closed its file in the matter, and so notified complainant DSCC.

Thereafter, on July 30, 1980, DSCC filed a complaint in this Court seeking to have the Commission's determination declared contrary to law. The following day, July 31, 1980, DSCC filed a motion for summary judgment. On August 18, 1980, FEC filed a cross-motion for summary judgment.

As the following discussion will show, there are no genuine issues as to any material facts in this action, and the Commission's action in dismissing petitioner's administrative complaint was not contrary to law. Accordingly, the Commission's cross-motion for summary judgment is granted, and petitioner's motion for summary judgment is denied.

DSCC's principal complaint is that under the agency arrangement engaged in between NRSC and State, when the State has insufficient funds to come up with its two cents per voting age population of the State, the NRSC makes up the difference up to a maximum of four cents: two cents per voting age population through its agency agreement with the National Committee plus two cents per voting age population pursuant to agency agreement with the State committee (plus the $17,500 allowable contribution to a senatorial candidate).

The FEC relied upon 2 U.S.C. § 441a(a)(4) which provides:

> The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district or local committees (including any subordinate committee thereof) of the same political party.

The FEC reasons that this provision authorizes the transfers challenged herein. In the FEC's view, it permits expenditures by the NRSC on behalf of the State committees subject to the express limitation on State committee spending contained in § 441a(d)(3).

In the instant case, the Court finds its scope of review to be a narrow one. It is well settled that courts must accord great deference to the agency below in its administration of the statute with which the agency is charged. *Bell v. Brown*, 181 U.S.App. D.C. 226; 557 F.2d 849 (1977).

Absent a finding that the FEC's determination was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, its determination must be affirmed. *Hampton v. Federal Election Commission*, [1980] Fed. Elec. Cap. Fin. Guide (CCH) ¶9036 at 50,439-40 (D.D.C. 1977), *aff'd*, No. 77-1546 (D.D. Cir. July 21, 1978) (unpublished opinion). *In re Federal Election Campaign Act Litigation*, 434 F.Supp. 1044, 1046 (D.D.C. 1979). The Court is unable to so find, and the decision below must remain undisturbed. Accordingly, petitioner's motion for summary judgment is denied, respondent's motion for summary judgment is granted, an appropriate order is entered herewith, and the petition is dismissed.

/s/ JUNE L. GREEN

U.S. District Judge

Judgment Entry of the United States District Court

(Filed August 28, 1980)

Civil Action No. 80-1903

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
Petitioner,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

The Court, having fully considered the motion for summary judgment filed by petitioner Democratic Senatorial Campaign Committee and the cross-motion for summary judgment filed by respondent Federal Election Commission, and the Court having heard arguments by both sides, it is by the Court this 28th day of August 1980,

ORDERED that the motion of petitioner Democratic Senatorial Campaign Committee for summary judgment is denied; it is further

ORDERED that the motion of respondent Federal Election Commission for summary judgment is granted in accordance with the Memorandum Opinion filed herein this date; and it is further

ORDERED that this action is dismissed.

/s/ JUNE L. GREEN
U.S. District Judge

APPENDIX C

The Certification of the Vote of the Federal Election Commission

(Dated July 11, 1980)

MUR 1234

BEFORE THE FEDERAL ELECTION COMMISSION

IN THE MATTER OF

NATIONAL REPUBLICAN SENATORIAL COMMITTEE

CERTIFICATION

I, Marjorie W. Emmons, Secretary of the Federal Election Commission, do hereby certify that on July 10, 1980, the Commission decided by a vote of 6-0 to take the following actions regarding MUR 1234:

1. Find NO REASON TO BELIEVE that the National Republican Senatorial Committee violated the Act in making expenditures, under 2 U.S.C. § 441a(d)(3), as agent of both the Republican National Committee and of a Republican State Committee.
2. CLOSE THE FILE in this matter.
3. Send the letters of notification as attached to the First General Counsel's Report dated July 8, 1980.

Voting for this determination were Commissioners Aikens, Friedersdorf, Harris, McGarry, Reiche, and Tiernan.

Attest:

/s/ MARJORIE W. EMMONS
Secretary to the Commission

APPENDIX D

Judgment Entry of the Court of Appeals for the District of Columbia Circuit

(Filed October 9, 1980)

No. 80-2074

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1980

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
Intervenor.

Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT, *Chief Judge,* and WILKEY and GINSBURG, *Circuit Judges*

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION THEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed and the Commission is directed to conform with this decision forthwith, in

accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court
/s/ GEORGE A. FISHER
Clerk

Opinion for the Court per curiam
Dissenting opinion filed by Circuit Judge Wilkey

APPENDIX E

Order of the United States Court of Appeals Denying Petition for Rehearing

(Filed October 11, 1980)

No. 80-2074

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1980

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
Intervenor.

Before: WRIGHT, *Chief Judge*, and WILKEY and GINSBURG, *Circuit Judges*

ORDER

Upon Consideration of intervenor's petition for rehearing and of its application to recall mandate, it is

ORDERED, by the Court, that intervenor's petition and its application are denied.

Per Curiam

For the Court:

/s/ GEORGE A. FISHER
Clerk

Order of the United States Court of Appeals Denying Rehearing En Banc

(Filed October 11, 1980)

No. 80-2074

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1980

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
Intervenor

BEFORE: WRIGHT, *Chief Judge*; MCGOWAN, TAMM, ROBINSON, ROBB, WILKEY, WALD, EDWARDS, and GINSBURG, *Circuit Judges*

ORDER

The suggestion for rehearing *en banc* filed herein by intervenor having been transmitted to the full Court and a majority of the judges in regular active service not having voted in favor thereof, it is

ORDERED, BY THE COURT, *EN BANC*, that intervenor's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

For the Court:

/s/ GEORGE A. FISHER
Clerk

Office-Supreme Court, U.S.
FILED
FEB 17 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-939 & 80-1129

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-939

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,

Respondent.

and

No. 80-1129

NATIONAL REPUBLICAN SENATORIAL COMMITTEE,

Petitioner,

v.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,

Respondent.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

REPLY BRIEF

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NATIONAL REPUBLICAN SENATORIAL COMMITTEE,

Petitioner,

v.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,

Respondent.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

REPLY BRIEF

I. THIS CASE IS NOT MOOT.

Respondent Democratic Senatorial Campaign Committee ("DSCC") has argued that the instant case is "moot" because the passage of the 1980 Congressional elections renders effective relief impossible. *See* Respondent's Brief in Opposition, *Federal Election Commission* v. *Democratic Senatorial Campaign Committee*, Nos. 80-939 & 80-1129, at 7-9 [hereinafter cited as Respondent's Brief in Opposition]. This case is not moot. The Court of Appeals judgment,

which is not contingent on the occurrence of any election,[1] places Petitioner National Republican Senatorial Committee ("NRSC") in the position of violating 2 U.S.C. §441a(d)(3) which may constitute a criminal offense punishable by fine or imprisonment, *see* 2 U.S.C. §437g(d)(1)(A). The judgment of the Court of Appeals requires the Federal Election Commission ("FEC") to commence enforcement proceedings against NRSC "forthwith." *Democratic Senatorial Campaign Committee* v. *Federal Election Commission*, No. 80-274, at A19 (D.C. Cir. Oct. 9, 1980) (*per curiam*) [hereinafter cited as *DSCC* v. *FEC* with page citations to NRSC's Appendix]. With the potential imposition of criminal penalties at issue in this case, there exists a live controversy that is ripe for resolution by this Court. *See Sibron* v. *New York*, 392 U.S. 40, 57 (1968).[2]

II. SUMMARY REVERSAL OF THE JUDGMENT OF THE COURT OF APPEALS MAY BE APPROPRIATE

DSCC now concedes, for the first time, that NRSC can legally "transfer funds, in unlimited amounts, to State committees for expenditures under [§441a(d)(3)] . . . or may hire or otherwise delegate staff" for the purpose of spending §441a(d) funds "as efficiently or wisely as possible." Respondent's Brief in Opposition, at 19. As Judge Wilkey pointed

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[1] Unlike the cases cited by DSCC in which plaintiffs sought injunctive relief prior to an election or political convention, in this case NRSC may suffer criminal and civil penalties regardless of the outcome of a particular election.

[2] In fact, DSCC's administrative complaint filed with the FEC on May 9, 1980 seeks civil penalties against NRSC for alleged past violations of §441a(d)(3) with respect to the *1978* senatorial elections which took place well before this action was commenced by DSCC. *See* First General Counsel's Report, Federal Election Commission Matter Under Review 1234, at D1 (July 8, 1980) [page citation to NRSC's Appendix]; Complaint and Request for Expedited Review, Federal Election Commission Matter Under Review 1234, at 4, 8 (May 9, 1980).

out below, this is all that NRSC has done in executing the agency agreements with state committees that are at issue in this case. *DSCC* v. *FEC* at A26-A29. Since DSCC's complaint relates solely to the use of the term "agency agreement," it amounts to an elevation of "form over substance" which cannot withstand statutory or constitutional analysis. *Id.* at A26.

DSCC has requested that this Court "vacate the judgment of the Court of Appeals and instruct the District Court to dismiss the action," Respondent's Brief in Opposition, at 8, a disposition that would not involve full briefing on the merits. This Court is already familiar with the merits of the case having denied DSCC's motion to vacate the Chief Justice's temporary stay of enforcement of the Court of Appeals judgment. *See Graves* v. *Barnes*, 405 U.S. 1201, 1203 (1972). Under these circumstances, NRSC respectfully suggests that issuance of a writ of *certiorari* and summary reversal of the judgment of the Court of Appeals is appropriate. *See, e.g., Mason* v. *City of Biloxi*, 385 U.S. 370 (1966) (*per curiam*); *Ellis* v. *United States*, 356 U.S. 674 (1958) (*per curiam*); *Ewing* v. *Gardner*, 341 U.S. 321 (1951) (*per curiam*).

Respectfully submitted,

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FILED
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ALEXANDER L. STEVAS,
CLERK

Nos. ~~80-939 &~~ 80-1129

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-939
FEDERAL ELECTION COMMISSION,
Petitioner,

v.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
Respondent.

and

No. 80-1129
NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
Petitioner,

v.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF PETITIONER NATIONAL REPUBLICAN SENATORIAL COMMITTEE

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QUESTIONS PRESENTED FOR REVIEW

1. Does 2 U.S.C. § 441a(d)(3) prohibit agreements through which state committees of a political party designate the senatorial campaign committee of the same party as the agent of the state committees to make limited expenditures in support of the party's candidates for election to the United States Senate?

2. Does 2 U.S.C. § 441a(d)(3), if construed to prohibit these agency agreements, violate the First Amendment by infringing upon rights of political expression and association?

3. Did the court of appeals err in conducting a *de novo* review of the Federal Election Commission's decision to dismiss an administrative complaint and in failing to defer to the longstanding practice of the agency?

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BRIEF OF PETITIONER NATIONAL REPUBLICAN SENATORIAL COMMITTEE

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit and the opinion of the United States District Court for the District of Columbia appear in the Appendix to Petitioner National Republican Senatorial Committee's Petition for Certiorari. That Appendix also contains the certification of the vote of the Federal Election Commission and its First General Counsel's Report in this proceeding.

JURISDICTION

The judment of the United States Court of Appeals for the District of Columbia Circuit was entered on October 9, 1980. A timely petition for rehearing *en banc* was denied on October 11, 1980, and the petitions for certiorari were filed within 90 days of that date. The jurisdiction of this Court is invoked under 2 U.S.C. § 437g(a)(9) and 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Code, Title 2:

§ *441a*

Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office.

(d) (1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.

(2) The national committee of a political party may not make any expenditure in connection with the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (e) of this section). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner of any other State, $10,000.

STATEMENT OF THE CASE

The National Republican Senatorial Committee ("NRSC") is a unit of the Republican Party organized in 1948 by Republican members of the United States

Senate specifically to support Republican senatorial candidates. Its counterpart, the Democratic Senatorial Campaign Committee ("DSCC"), is a political committee composed of Senators of the Democratic Party which regularly supports senatorial candidates of that party. DSCC and NRSC are supported by voluntary limited contributions from individuals and committees.

In 1980 the Republican National Committee ("RNC") and the Democratic National Committee ("DNC") each executed written agreements designating NRSC and DSCC respectively as their agents for the purpose of making expenditures up to the limits contained in 2 U.S.C. § 441a(d)(3), a provision of the Federal Election Campaign Act of 1971, as amended ("FECA").[1] RNC had entered into a similar agreement with NRSC in 1978.[2]

Section 441a(d)(3) limits expenditures that may be made by the national or a state committee of a political party "in connection with the general election campaign of" a candidate for Congress.[3] Under § 441a(d)(3), these committees "may not make any expenditure" in connection with the campaign of a candidate for United States

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[1] 2 U.S.C. §§ 431-55 (1976 & Supp. III 1979) (originally enacted as Federal Election Campaign Act of 1971, Pub. L. No. 92-225, §301, 86 Stat. 11, as amended by Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, §201, 88 Stat. 1272; Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, §101, 90 Stat. 475; and Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, §101, 93 Stat. 1339) [hereinafter cited to 2 U.S.C. unless otherwise indicated].

[2] These agreements are not challenged by DSCC in this case. *See* Democratic Senatorial Campaign Comm. v. FEC, No. 80-2074, at A5 (D.C. Cir. Oct. 9, 1980) (*per curiam*) [hereinafter cited as *DSCC v. FEC* with page citations to Appendix to NRSC's Petition for Certiorari].

[3] 2 U.S.C. § 441a(d)(3).

Senator which exceeds the greater of $20,000 or "2 cents multiplied by the voting age population of the State."[4]

In 1980, pursuant to agency agreements, NRSC and DSCC made expenditures on behalf of RNC and DNC respectively in senatorial campaigns. As a result of and in accordance with the agency agreements, DNC and RNC, through their respective senatorial committees, have financed communications and general campaign activities in support of the election of Republican and Democratic senatorial candidates.

In 1978 a number of state committees entered into similar written agency agreements with NRSC. Accordingly, in the course of the 1978 senatorial campaigns, NRSC spent $2,770,995 as agent for RNC and several Republican state committees, a figure well within the overall limitations contained in § 441a(d)(3) for expenditures by these committees. *DSCC* v. *FEC,* at A4. After the 1978 campaign, the Federal Election Commission ("FEC") decided, on two separate occasions, that NRSC's agreements with these state committees were consistent with § 441a(d)(3). *In re National Republican Senatorial Committee,* Federal Election Commission Matter Under Review 820; *In re National Republican Senatorial Committee,* Federal Election Commission Matter Under Review 780. In 1980 a number of state committees again entered into agency agreements with NRSC.

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[4] *Id.* With respect to campaigns for election to the House of Representatives in multi-district states, the expenditure limitation is $10,000 per electoral contest. *Id.* Section 441a(d)(3) does not apply to party expenditures on behalf of presidential candidates which are governed by § 441a(d)(2). This latter provision is not at issue in this case.

On May 9, 1980 DSCC filed an administrative complaint with the FEC alleging that NRSC's agreements with state committees in 1978 and 1980 violate § 441a(d)(3). The complaint did not challenge the identical agreement between NRSC and RNC.[5] After reviewing a report prepared by its General Counsel,[6] the FEC dismissed the complaint on July 11, 1980 by a vote of 6-0. The FEC concluded that there was "no reason to believe" that the agreements violate § 441a(d)(3).[7]

On July 30, 1980 DSCC filed a petition for review in the United States District Court for the District of Columbia pursuant to 2 U.S.C. § 437g(a)(8) requesting a declaratory judgment that the FEC's decision was contrary to law. On August 28, 1980 the district court, which denied NRSC's motion to intervene, granted the FEC's motion for summary judgment and concluded that the FEC's decision was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Democratic Senatorial Campaign Committee* v. *Federal Election Commission,* No. 80-1903, at B4 (D.D.C. Aug. 28, 1980) [page citation to Appendix to NRSC's Petition for Certiorari].

On September 4, 1980 DSCC docketed an appeal of the district court decision in the United States Court of Appeals for the District of Columbia Circuit. The court of appeals granted NRSC leave to intervene on September 22. Following oral argument before Chief Judge Wright and Judges Wilkey and Ginsburg, the court of appeals reversed the decision of the district court on October 9, 1980 in a *per curiam* opinion. Judge Wilkey dissented.[8]

[5] *See* DSCC v. FEC, at A5.

[6] *See* Appendix to NRSC's Petition for Certiorari, at D1 (In re National Republican Senatorial Committee, FEC Matter Under Review 1234).

[7] *Id.* at C1.

[8] *See id.* at A1.

The court of appeals concluded that in the absence of explicit statutory authorization the agreements between NRSC and the state committees violate § 441a(d)(3). As a result, NRSC's expenditures in support of senatorial candidates exceeded the limitations contained in § 441a(d)(3). Accordingly, the court declared the FEC's failure to act on DSCC's complaint "contrary to law," and ordered the FEC to "conform" to its decision "forthwith."[9] The court, *sua sponte*, ordered the mandate to issue "forthwith."[10] On October 10, 1980 NRSC filed a petition for rehearing with a suggestion for rehearing *en banc* and an application to recall the mandate. Both motions were denied by the court of appeals on October 11.[11]

Having exhausted all available avenues of relief in the court of appeals, NRSC applied on October 16, 1980 to the Chief Justice of the United States for an order to stay enforcement of the judgment below. *See* 28 U.S.C. § 2101(f) (1976). On October 17 the Chief Justice entered an order temporarily granting the application.[12] The Court denied a motion by DSCC to vacate the stay on October 21.[13] DSCC filed a motion for "expedited consideration" on October 27 which the Chief Justice denied as "moot" on October 28.[14] The stay entered by

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[9] *Id.* at A19. The judgment directs the FEC to remedy the claimed violation of § 441a(d)(3). *See* 2 U.S.C. § 437g. In the event the FEC fails to "conform" with the judgment, DSCC may itself seek judicial enforcement against NRSC. *Id.* § 437g(a)(8)(C).

[10] *See* Appendix to NRSC's Petition for Certiorari, at E2.

[11] *See id.* at F1.

[12] *See* Joint Appendix ("J.A."), at 7.

[13] *Id.* at 8.

[14] *Id.* at 9.

the Chief Justice on October 17, 1980 and reviewed by the Court on October 21, 1980 remains in effect.

The FEC filed a petition for a writ of certiorari on December 10, 1980 (No. 80-939) and NRSC filed a petition for a writ of certiorari on January 6, 1981 (No. 80-1129). On March 2, 1981 this Court granted both writs and consolidated the cases for briefing and argument.

SUMMARY OF ARGUMENT

A.1. The language of 2 U.S.C. § 441a(d) gives national and state committees of political parties broad authority to make expenditures in support of candidates for federal office. 2 U.S.C. § 441a(d)(1). The only restriction placed on this expenditure authority is the dollar limitations of § 441a(d)(3). Section 441a(d)(3) does not restrict the method, including agency agreements, by which party committees may make these expenditures. No prohibition of agency agreements is evident from the plain language of § 441a(d).

2. Section 441a furthers the purpose of FECA by preventing undue influence on candidates caused by large campaign contributions. The effect of §§ 441a(a)(1), (2) and (3) is to limit contributions to party committees. The candidate does not know who contributed the funds that a party committee spends on his behalf. *See* 2 U.S.C. § 441a(a)(8); 11 C.F.R. § 110.6 (1981). Once the limited contributions are received by party committees the purpose of § 441a is not advanced by prohibiting transfer of funds between such committees. Accordingly, Congress ensured that party committees, including senatorial and congressional campaign committees, remain free to transfer unlimited funds under § 441a(a)(4). The agency agreements between NRSC and state committees are con-

sistent with the transfer authority of § 441a(a)(4). The agreements comport with the purpose of § 441a because contributions received by party committees are limited by § 441a(a) and amounts expended by party committees on behalf of senatorial candidates are limited by § 441a(d)(3). To construe § 441a(d)(3) to prohibit agency agreements conflicts with the transfer authority of § 441a(a)(4), destroys the harmony of the statutory scheme and undermines its purpose.

3. The legislative history of § 441a(d) confirms that agency agreements are consistent with congressional intent. Section 441a(d) was originally proposed in S.3044, §304, which contemplated total public financing of general election campaigns for federal office. *See* S.3044, §101, 93d Cong., 2d Sess. 71-78, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 73-80 (1977). Even under this proposed system of public financing, Congress intended to preserve "the role of political parties in private financing for federal candidates." S. Rep. No. 93-689, 93d Cong., 2d Sess. 7, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 103 (1977). Congress further intended that party committees retain flexibility with regard to structuring the use of funds in political campaigns. NRSC and state committees are free to enter agency agreements which enhance the role of political parties in the electoral process by facilitating the pooling of resources to amplify the message of the party and its adherents.

B.1. Section 441a(d)(3) operates in an area at the core of First Amendment guarantees of free expression and association. *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976), leaves

no doubt that "[t]he Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." State committees enter into agency agreements with NRSC in order to enhance their advocacy of party candidates by utilizing the resources and political expertise of NRSC. The court of appeals construction of § 441a(d)(3) restricts the ability of party committees to engage in effective advocacy of the election of senatorial candidates.

2. In light of the First Amendment interest implicated by the court of appeals decision, its construction of § 441a(d)(3) can be supported only if it serves a substantial governmental interest. *Id.* at 47. In *Buckley,* this Court held that the only sufficiently compelling governmental interest in this area is "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions." *Id.* at 25. The court of appeals did not and cannot claim that its reading of § 441a(d)(3) is necessary to stem incipient political corruption since "there is no visible evil in any 'undue influence' by a political party on its own nominated candidate." *DSCC* v. *FEC,* at A38 (Wilkey, J., dissenting).

3. The court of appeals construction of § 441a(d)(3), which is inconsistent with the interpretation of both the district court and the unanimous FEC, is at odds with the plain meaning of the statute and the First Amendment requirements articulated in *Buckley.* When First Amendment rights are at stake, a reviewing court must read the statute at issue narrowly in order not to limit the quantity of political expression. *Id.* at A39. The court of appeals disregarded this maxim of statutory construction.

C. The express grant of exclusive jurisdiction to the FEC over enforcement of FECA limits judicial review of the FEC's dismissal of an administrative complaint. *In re Carter-Mondale Reelection Committee, Inc.*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9132, at 51,038 (D.C. Cir. Sept. 12, 1980). If the FEC has not acted in a manner which is arbitrary or capricious, an abuse of discretion or otherwise contrary to law, its decision should not be overturned. *Hampton* v. *Federal Election Commission,* Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9036, at 50,444 (D.D.C. Apr. 15, 1977), *aff'd mem.*, No. 77-1546 (D.C. Cir. July 21, 1978). In the instant case, the FEC's decision has a reasonable basis in law. It is consistent with past practices of the agency and supported by the language and purpose of the statute. The FEC's finding of "no reason to believe" that NRSC violated FECA in making expenditures under § 441a(d)(3) as agent of Republican state committees is entitled to deference by reviewing courts and should be upheld. *DSCC* v. *FEC,* at A29 (Wilkey, J., dissenting).

ARGUMENT

A. Section 441a(d)(3) Does Not Prohibit State Committees Of A Political Party From Designating The Senatorial Campaign Committee Of The Same Party As The Agent Of The State Committees To Make Limited Expenditures In Support Of The Party's Senatorial Candidates.

1. The plain language of 2 U.S.C. § 441a(d) does not prohibit agency agreements.

"[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 100 S. Ct. 2051, 2056 (1980); *accord, Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 210 (1979). "Absent a

clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *GTE Sylvania, Inc., supra,* 100 S. Ct. at 2056. Application of this fundamental rule establishes that § 441a(d) does not prohibit the agency agreements at issue.

Section 441a(d)(1) provides that "*[n]otwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions,*" the national and state committees of a political party "may make expenditures in connection with the general election campaign of candidates for Federal office" subject to the dollar limitations of subsections (2) and (3). 2 U.S.C. § 441a(d)(1) (emphasis added). Section 441a(d)(3) permits the "national committee of a political party, or a state committee of a political party" to make expenditures "in connection with the general election campaign of a [senatorial] candidate . . . who is affiliated with such party" of up to 2 cents per voting age resident. *Id.* § 441a(d)(3).

The court of appeals found that § 441a(d)(3) authorizes only two named committees, the national and state committees of a political party, to make expenditures in support of party candidates. *DSCC* v. *FEC*, at A13. The court concluded that NRSC was neither the national committee nor a state committee of the Republican Party.[13] In addition, the court found that the statute made no reference to "any other kind of permissible arrangement by which the state committees can delegate their spending authority to any other organization." *Id.* The court held, therefore, that § 441a(d)(3) "preclude[s] any arrangement by which the special [spending] authority" of the national

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[13] DSCC v. FEC, at A13; *see* 2 U.S.C. §§ 431(14) & (15).

or state committees is transferred to another party committee. *Id.*[16]

The court of appeals construction is erroneous. The prefatory language of § 441a(d) provides that "[n]otwithstanding any other provision of law" with respect to expenditure and contribution limitations, national and state committees may make expenditures in support of party senatorial candidates up to the limits of § 441a(d)(3). This language confers broad expenditure authority upon national and state party committees. The limitations of § 441a(d)(3) restrict *only* the overall dollar amounts which the national or state committees may spend in campaigns for federal office. *Id.* at A22 (Wilkey, J., dissenting).

Section 441a(d)(3) does not restrict the methods which may be used by the national and state committees to expend monies within the overall dollar limits. It contains *no* reference to agreements whereby state committees or the national committee of a political party designate other party committees to make expenditures in support of the party's candidate. As the court of appeals acknowledged, the "language of Section 441a(d)(3) presumably does not prohibit a State political committee's employment of an agent in the standard legal sense."[17] Since the statute permits use of agents by na-

[16] Since DSCC's agency agreement with DNC and NRSC's agency agreement with RNC are the "exact parallel" to NRSC's agreements with state committees, the court of appeals reasoning would bar these agency agreements. DSCC v. FEC, at A25 (Wilkey, J., dissenting).

[17] DSCC v. FEC, at A14. Notwithstanding this acknowledgement, the court characterized the agreements between NRSC and the state committees as "artificial relationships" not authorized by § 441a(d)(3). *Id.* The court cited no factual support for its conclusion that the agreements are artificial or otherwise inconsistent with the statute.

tional or state committees, it cannot be read to prohibit agency agreements between NRSC and Republican state committees.

In sum, the plain language of § 441a(d) confers broad authority upon the national and state committees to make expenditures within the designated overall dollar limitations. Nowhere does it restrict the permissible means, including the use of agency agreements, of making these expenditures. The agency agreements between NRSC and Republican state committees are not prohibited by § 441(a)(d)(3).

2. Agency agreements comport with the meaning and purpose of FECA.

The court of appeals failed to construe FECA as a whole in order to effectuate its purpose and give meaning to each provision of § 441a. *See Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1973); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). The purpose of federal election reform as embodied in FECA is the elimination of undue and corrupting influences of large campaign contributors on successful political candidates. *Buckley* v. *Valeo*, 424 U.S. 1, 25-26 (1976); *DSCC* v. *FEC*, at A32-A33 (Wilkey, J., dissenting). This purpose is served by § 441a.

Section 441a(a)[18] prevents undue influence on candidates by delineating permissible contributors and

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[18] Section 441a(a) provides in pertinent part:

§ 441a. Limitations on contributions and expenditures.

(a) *Dollar limits on contributions.*

(1) No person shall make contributions —

(A) to any candidate and his authorized political committees with respect to any election for Federal office, which in the aggregate, exceed $1,000;

amounts of contributions to political committees and candidates for federal office. The effect of subsections (a)(1), (2) and (3) is to limit the dollar amount of contributions from all sources to party committees. Once party committees receive these limited contributions, a successful candidate cannot be unduly influenced by any contributor to a party committee that supports the candidate. *Id.* at A35. The amount of the individual contribution is limited and the candidate does not know

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(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $20,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(2) No multicandidate political committee shall make contributions —

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(3) No individual shall make contributions aggregating more than $25,000 in any calendar year. For purposes of this paragraph, any contribution made to a candidate in a year other than the calendar year in which the election is held with respect to which such contribution is made, is considered to be made during the calendar year in which such election is held.

(4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party. For purposes of paragraph (2), the term "multicandidate political committee" means a political committee which has been registered under section 433 of this title for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

who contributed the particular funds he receives from any party committee. *Id.*[19] Furthermore, party committee expenditures are subject to the overall spending limitations under § 441a(d)(3). *Id.*[20]

Congress recognized that the purpose of § 441a is not advanced by prohibiting transfer of funds between political committees of the same party. As a result, Congress provided in § 441a(a)(4) that the contribution limitations contained in §§ 441a(a)(1)-(3) "do not apply to transfers" between political committees which are "national, State, district or local committees" of the "same political party." 2 U.S.C. § 441a(a)(4); *DSCC* v. *FEC*, at A23 (Wilkey, J., dissenting).[21]

Under § 441a(a)(4) national senatorial committees may make unlimited transfers to or receive unlimited transfers from national, state or local committees of the

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[19] See 2 U.S.C. § 441a(a)(8), and 11 C.F.R. § 110.6 (1981), which require any contributions to a committee that are earmarked for a particular candidate to be treated as contributions to that candidate for purposes of contribution limitations under § 441a(a). Section 441a(a)(8) prevents the use of party committees as conduits for contributions to a particular candidate and ensures that a candidate will not know the identity of contributors of the fungible funds that a party committee expends on his or her behalf.

[20] Neither DSCC nor the court of appeals suggests that expenditures in accordance with agency agreements circumvent the overall dollar limitations placed on party committee expenditures by § 441a(d)(3). DSCC v. FEC, at A33 (Wilkey, J., dissenting).

[21] Until 1976 all political committees, including non-party committees, could make unlimited fund transfers to each other. The 1976 amendments to FECA for the first time imposed limits on contributions from one political committee to another. 2 U.S.C. §§ 441a(a)(1)(C) & (2)(C). In § 441a(a)(4), however, Congress excepted party committees from these limitations in order to maintain the freedom of party committees to transfer funds.

same party. *See id.* at A32.[22] Delegation of authority under agency agreements between the national and state committees and NRSC is tantamount to a transfer of funds between these committees.[23] To construe § 441a(d)(3) to prohibit agency agreements is inconsistent with § 441a(a)(4)'s express grant of transfer authority to party committees, including senatorial campaign committees.

Agency agreements comport with the purpose of § 441a because funds received by NRSC are limited by § 441a(a) and funds expended by NRSC are within the overall limitations of § 441a(d)(3). *Id.* at A26. Candidates benefit from enhanced party advocacy on their behalf which in turn encourages candidate loyalty to the party and decreases candidate vulnerability to influence from individual pressure groups. *Id.* at A37. Construing § 441a(d)(3) to prohibit agency agreements conflicts with the meaning of § 441a(a)(4), destroys the harmony of the statutory scheme of § 441a and undermines its purpose.

3. The legislative history of 2 U.S.C. § 441a confirms that agency agreements are consistent with congressional intent.

Congress did not intend to prohibit agency agreements between party committees. Section 441a(d) was originally proposed in 1974 as part of S.3044, § 304,[24]

[22] National senatorial committees are national committees for purposes of the transfer provision. S. Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. 58, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1976, at 1052 (1977); DSCC v. FEC, at A32 n.16 (Wilkey, J., dissenting); Respondent's Brief in Opposition, at 7-9.

[23] DSCC v. FEC, at A26 (Wilkey, J., dissenting). Judge Wilkey notes that the difference between agency agreements and fund transfers is "purely one of form, not substance." *Id.*

[24] The Senate version of this provision was adopted by the conference committee, S. Conf. Rep. No. 93-1438, 93d Cong., 2d Sess.

which, when introduced, contemplated total public financing of general election campaigns for federal office. S.3044, §101, 93d Cong., 2d Sess. 71-78, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 73-80 (1977). Even under this proposed system of public financing, Congress intended to preserve "the role of political parties in private financing for federal candidates." S. Rep. No. 93-689, 93d Cong., 2d Sess. 7, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 103 (1977).[25]

The Senate Report recognized that "pooling resources from many small contributors is a legitimate function and an integral part of party politics." *Id.* Section 441a(d) was intended as "a special provision for private funding by *political parties.*" *Id.* (emphasis added). Its purpose was to permit candidates for federal office to accept full public assistance and benefit from "substantial private funding, in addition to the public grant, in the form of expenditures by state and national party committees." *Id.* Money received by party com-

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56, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 1000 (1977), and ultimately passed by Congress, *id.* at 1122.

[25] In considering the 1974 amendments to FECA, Congress was familiar with the traditional role of state and national committees, including the senatorial and congressional committees, in private financing for federal candidates. *See* 2 U.S.C. § 434(d)(1976) (repealed Pub. L. No. 96-187, § 104, 93 Stat. 1348 (1979)); H. R. Rep. No. 93-1239, 93d Cong., 2d Sess. 157, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 791 (1977) (comments of Representative Frenzel describing role of national party committees, *including* congressional and senatorial campaign committees, and urging adoption of § 441a(d) to "allow parties to play a strong role in the electoral process").

mittees in keeping with the contribution limits would increase party resources "to conduct *party-wide* election efforts." *Id.* at 104 (emphasis added). Section 441a(d) was enacted to protect and enhance the role of parties "in building strong coalitions of voters and in keeping candidates responsible to the electorate through the party organization." *Id.* The conference committee adopted § 441a(d) as passed by the Senate. S. Conf. Rep. No. 93-1438, 93d Cong., 2d Sess. 56, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 1000 (1977).[26]

The legislative history of § 441a(d) establishes that Congress intended to preserve the freedom of political parties to structure party committee spending in support of candidates for federal office. Agency agreements comport with this congressional intent. Such agreements facilitate the "pooling" of resources by coalitions of voters, S. Rep. No. 93-689, 93d Cong., 2d Sess. 7, *reprinted in* Legislative History of Federal Election Campaign Act of 1974, at 103 (1977), in order to enhance the effectiveness of their message in support of party candidates. Agency agreements permit all party committees to benefit from fundraising and media expertise and economies of scale. *See DSCC* v. *FEC,* at A28-A29 (Wilkey, J., dissenting). In turn, effective use of party resources in support of party candidates encourages candidate loyalty and responsiveness to the party.[27]

[26] The public financing provisions for congressional campaigns were deleted in conference. S. Conf. Rep. No. 93-1438, 93d Cong., 2d Sess. 1, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 945 (1977).

[27] Many of the abuses associated with the 1972 presidential election campaign, which prompted the 1974 amendments to FECA, might have been avoided if President Nixon had not largely circumvented party committees in favor of the Committee to Re-Elect the President. *See* S. Rep. No. 93-981, 93d Cong., 2d Sess. 18-20 (1974).

In contrast to this abundant evidence of congressional intent to provide parties with flexibility, there is no evidence of intent to prohibit agency agreements.[28] The legislative history establishes that agency agreements are consistent with congressional intent.[29]

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[28] The court of appeals points to the rejection of an amendment proposed by Senator Brock, which would have exempted congressional and senatorial campaign committees from § 441a(d)'s expenditure limits, as confirmation that Congress did not intend to permit agency agreements. DSCC v. FEC, at A16. However, the overall expenditure limitations are not at issue in this case and there is no contention that such limitations were exceeded. *Id.* at A33 (Wilkey, J., dissenting).

[29] Continued congressional concern with the ability of political parties to structure their own finances is evidenced by consideration and rejection of H.R. 11315 in 1978. H.R. 11315, 96th Cong., 1st Sess. (1979). Section 313 of that bill contained language that would have prohibited any "movements of funds" between "the political committees of a national political party (including house and senate campaign committees of such party) and the political committees of a state political party for the purpose of making contributions to, or expenditures on behalf of, any candidate for federal office." *Id.* The House rejected a rule for consideration of H.R. 11315. 124 Cong. Rec. H2261-69 (daily ed. Mar. 21, 1978).

The basis for the rejection is reflected in various comments attacking the bill. Representative Mikva remarked that he "deeply regretted that the committee in its wisdom saw fit to change the party financing." *Id.* at H2265. Representative Stockman urged defeat of the bill stating that the proposed legislation was a "fundamental assault on the very integrity, the continued viability, the continued meaningful role of our political parties." *Id.* at H2264; *see* note 37 *infra*.

Overt acts of Congress are significant in determining legislative intent. *See, e.g.*, Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 199-201 (1974); Tennessee Valley Auth. v. Hill, 437 U.S. 153, 181-85 (1978). The rejection of H.R. 11315 and the debate in connection with that action evidence congressional intent to leave the structuring of funding in relation to federal candidates up to each

B. The Court Of Appeals Decision Restricts Political Expression And Association Protected By The First Amendment Without Furthering Any Substantial Governmental Interest.

Section 441a(d)(3), as construed by the court of appeals, burdens the First Amendment interest in free political expression and association and fails to further any substantial governmental interest. So construed, the statute is unconstitutional. Construing § 441a(d)(3) in accordance with its plain meaning avoids unconstitutional restrictions of First Amendment rights.

1. The court of appeals construction of 2 U.S.C. § 441a(d)(3) restricts constitutionally protected rights of political expression and association.

Section 441a(d)(3) operates in an area at the core of the First Amendment guarantee of free expression. *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976), proceeds from the premise that freedom to discuss public officials and oppose or support their continuation in office constitutes the "central meaning" of the First Amendment, *see New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964); *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966), because "speech concerning public affairs is more than self-expression; it is the essence of self-government," *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964). Political expression is afforded maximum constitutional protection because of its "inherent worth in terms of its capacity for informing the public." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 777 (1978); *accord*,

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political party and its committees. *See* Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 412-13 (1972); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 460-61 (1974).

Consolidated Edison Co. v. *Public Service Commission,* 100 S. Ct. 2326 (1980).[19]

In *Buckley,* this Court held that a "restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression." 424 U.S. at 19. By limiting campaign contributions and expenditures, FECA "constitutes a restriction on communication . . . since virtually all meaningful political communications in the modern setting involve the expenditure of money." *Id.* at 11. *Buckley* leaves no doubt that "the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests." *Id.* at 23.

Section 441a(d)(3) also implicates the freedom of political association protected by the First Amendment. *Id.* at 15. "[T]he right of individuals to associate for the advancement of political beliefs," *Williams* v. *Rhodes,* 393 U.S. 23, 30 (1968), is a "basic constitutional freedom," *Kusper* v. *Pontikes,* 414 U.S. 51, 57 (1973); *accord, Democratic Party* v. *LaFollette,* 49 U.S.L.W. 4178, 4182 (U.S. Feb. 24, 1981) (No. 79-1631); *Shelton* v. *Tucker,* 364 U.S. 479, 486 (1960); *Bates* v. *City of Little Rock,* 361 U.S. 516, 522-23 (1960). When individuals join together to form a political association, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced." *NAACP* v. *Alabama,* 357 U.S. 449, 460 (1958). Freedom of association, and hence effective political advocacy, is implicated by limitations on the ability of individuals to "pool money through contribu-

[19] In *Buckley,* this Court rejected a claim that 18 U.S.C. § 608(f), the predecessor of 2 U.S.C. § 441a(d), violated the Fifth Amendment. 424 U.S. at 58-59 nn. 66 & 67. No First Amendment challenge to § 608(f) was before the Court in *Buckley.*

tions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'" *Buckley, supra,* 424 U.S. at 65; *accord, Common Cause* v. *Schmitt,* Nos. 80-1609 & 80-1754, slip op. at 14 (D.D.C. Sept. 30, 1980) (three-judge court), *prob. juris. noted,* 48 U.S.L.W. 3616 (U.S. Feb. 23, 1981) (Nos. 80-847 & 80-1067).

The agency agreements at issue in this case facilitate the exercise of these First Amendment rights. The state and national committees of the major political parties enter into these agreements in order to enhance their political expression and association by utilizing the financial resources and national political expertise of NRSC. *DSCC* v. *FEC,* at A28-A29 (Wilkey, J., dissenting). The effectiveness of political expression and association is maximized in a number of ways by designation of NRSC to make § 441a(d)(3) expenditures, including "economy of scale in expenditures from one source, . . . available expertise in creating and placing advertisements, . . . obtaining media exposure, [and] obtaining credit during the campaign." *Id.* NRSC is able to "pool money from individuals who are interested in politics and amplify their shared viewpoint into an efficient political message," *Common Cause, supra,* slip op. at 14.[31]

These functions are especially significant because of the "increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning." *Buckley, supra,* 424 U.S. at 26. Such effective political expression and association are at "the heart" of the First Amendment for "the constitution 'protects expression which is eloquent no less than that which is unconvincing.' " *Bellotti, supra,* 435 U.S. at 790 (quoting *Kingsley International*

[31] *See* S. Rep. No. 93-689, 93d Cong., 2d Sess. 7, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 103 (1977).

Pictures Corp. v. *Regents*, 360 U.S. 684, 689 (1959)); *NAACP* v. *Button*, 371 U.S. 415, 428-31 (1963).

The First Amendment interest in effective political expression and association as practiced by NRSC is representative of the constitutional protection generally afforded political parties in federal election campaigns.[32] The party "is but the medium through which its individual members seek to make more effective the expression of their own views." *NAACP* v. *Alabama*, *supra*, 357 U.S. at 459. This Court has held that the "right to associate with the political party of one's choice is an integral part of the basic constitutional freedom" to associate. *Kusper*, *supra*, 414 U.S. at 57. A restriction on a political party in its conduct of an election campaign "is simultaneously an interference with the freedom of its adherents." *Cousins* v. *Wigoda*, 419 U.S. 477, 487 (1975) (quoting *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957)); *Democratic Party*, *supra*, 49 U.S.L.W. at 4182.

The court of appeals incorrectly assumed that no First Amendment interests are implicated by reading § 441a(d)(3) to invalidate the agency agreements at issue here. It asserted that the "coordinated expenditures" on behalf of a candidate made by NRSC are merely "contributions" to that candidate, *DSCC* v. *FEC*, at

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[32] The historic role of political parties as the primary institution for aggregating and articulating the views of large groups of voters is well-documented. *See, e.g.*, E. Ladd, Jr., Where Have All the Voters Gone? (1978); J. Kirkpatrick, Dismantling the Parties (1978); Parties, Interest Groups, and Campaign Finance Laws (M. Malbin ed. 1980); The New American Political System (A. King ed. 1978). There is little dispute among political scientists that "for a century and a half, U.S. political parties have been a force for extending democracy." E. Ladd, *supra*, at 59.

A13-A14 n.28; *see* 2 U.S.C. § 441a(a)(7)(B)(i), which are entitled to no constitutional protection, *DSCC* v. *FEC*, at A13 n.26. But, as Judge Wilkey noted in his dissent, "the majority fails to grasp the significance of what the Supreme Court did in *Buckley*" when this Court held that "*both*" contributions and expenditures are protected by the First Amendment. *Id.* at A39 n.27 (Wilkey, J., dissenting) (emphasis in original).

The First Amendment interests involved in this case are much greater than those implicated by the contribution limits upheld in *Buckley*. In *Buckley*, this Court reasoned that a limit on the amount of a political contribution to a candidate is of comparatively *less* constitutional significance than an independent expenditure limitation because a "contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." 424 U.S. at 21. The "quantity of communication . . . does not increase perceptibly with the size of [the] contribution." *Id.*

Here, in contrast, a prohibition of NRSC's agency agreements with state committees will directly decrease the *quantity* and the *quality* of the party's political expression by depriving state committees of the discretion to enter into agency agreements with NRSC which may more effectively advocate their views.[33] Expenditures by NRSC at the behest of state committees constitute political expression by the Republican Party. Such expenditures are therefore distinguishable from contribu-

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[33] *See* Ripon Society, Inc. v. National Republican Party, 525 F.2d 567, 585 (D.C. Cir.) (*en banc*), *cert. denied*, 424 U.S. 933 (1976) ("a party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests deserves the protection of the constitution").

tions to candidates, where "the transformation of contributions into political debate involves speech by someone other than the contributor," *id.* at 21.[34]

This Court confronted a similar situation in *Buckley* with respect to expenditures by a candidate on his own behalf. *See id.* at 52 n.58. The court of appeals in *Buckley* had held that such expenditures should be treated as "contributions" by the candidate to himself, subject to FECA's strict limitations on contributions. This Court rejected such an analysis because, "unlike a person's contribution to a candidate, a candidate's expenditure of his personal funds directly facilitates his own political speech." *Id.* Similarly, expenditures by a political party in support of a candidate are more than symbolic manifestations of support for that candidate — they "directly facilitate" party advocacy of its candidates' election campaigns.

2. The court of appeals construction of 2 U.S.C. § 441a(d)(3) does not further a substantial governmental interest.

The court of appeals decision burdens the First Amendment interest in effective political expression and

[34] Party expression is entitled to extensive constitutional protection especially since the FEC has barred party committees, including NRSC, from making "independent expenditures." *See* 11 C.F.R. § 110.7(b)(4) (1981). While other political associations and individuals can "spend as much as [they choose] . . . to collect for political speech, including advocacy of a particular candidate's election," California Medical Ass'n v. FEC, No. 79-4426, slip op. at 9 (9th Cir. May 23, 1980), *review pending*, 49 U.S.L.W. 3207 (U.S. Oct. 7, 1980) (No. 79-1952), all political party expenditures in support of congressional candidates are subject to the limitations contained in § 441a(d)(3). Under the court of appeals construction of § 441a(d)(3), DSCC and NRSC would be prohibited from making *any* expenditures in support of senatorial candidates.

association. The court's construction of § 441a(d)(3) can only be supported if it serves a substantial governmental interest. *Buckley, supra*, 424 U.S. at 47; *Cousins, supra*, 419 U.S. at 489; *NAACP* v. *Alabama, supra*, 357 U.S. at 460. In *Buckley*, this Court held that the only sufficiently compelling governmental interest in this area is "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." 424 U.S. at 25; *accord, Common Cause, supra*, slip op. at 9. This governmental interest will override First Amendment rights because "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." *Buckley, supra*, 424 U.S. at 26.

The court of appeals does not and could not claim that its reading of § 441a(d)(3) is necessary to stem incipient political corruption. "[T]here is no visible evil in any 'undue influence' by a political party on its own nominated candidate." *DSCC* v. *FEC*, at A38 (Wilkey, J., dissenting). The more a candidate is beholden to his own political party for a substantial portion of his campaign funds, the less vulnerable he is to pressure groups. *Id.* at A36. Any possibility that a candidate would be unduly influenced by a contributor to his political party is effectively prevented by §§ 441a(a)(1)(B) & (2)(B), which limit the amount of such contributions. As in *Buckley*, "[t]he interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by . . . campaign expenditure ceilings." 424 U.S. at 55; *accord, Common Cause, supra*, slip op. at 10.

In *Buckley*, this Court employed a similar analysis of the alleged governmental interest supporting limits on a candidate's expenditure of his personal funds. The Court determined that there is no threat of corruption or apparent corruption when a candidate spends his personal funds. *Buckley, supra*, 424 U.S. at 53. "Indeed, the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse." *Id.* Political party expenditures, which also raise no question of potential corruption, serve an analogous function by fixing the candidate's allegiance firmly to his party, a wholly salutary result.

The court of appeals asserted that its construction of § 441a(d)(3) is necessary to encourage the development of vigorous state party organizations. *DSCC* v. *FEC*, at A18. The court of appeals reasoned that by designating NRSC as its agent a state committee defeats Congress's intention that it play an active role in senatorial campaigns. *Id.* at A19. Nowhere in the legislative history is there any suggestion that Congress intended to create any special role for state committees under § 441a(d)(3)." Even if such an intent could be

" This paucity of relevant legislative history stands in bold contrast to the 1979 amendments to the statute in which Congress clearly expressed an intention to assist local party committees by passing legislation exempting them from limits on expenditures for so-called "grassroots" activities. In passing this provision, unlike § 441a(d), Congress stated that it intended "to encourage volunteers to work for and with local and State political party organizations." H.R. Rep. No. 96-422, 96th Cong., 1st Sess. 9 (1979), *reprinted in* [1979] *U.S. Code Cong. & Ad. News*, 2860, 2868. Assuming that such a congressional intent did exist, however, the agency agreements at issue here are in no way at odds with a desire to foster the role of state committees. Under § 441a(d)(3), a state committee retains the power to spend its allotted funds or to designate an agent, such as NRSC, to act on its behalf. The state committee has sole dis-

discerned, it does not rise to the compelling level necessary to support a restriction on political expression and association such as the court of appeals interpretation of § 441a(d)(3).

In the last analysis, the only interest served by an interpretation of § 441a(d)(3) to prohibit agency agreements is the suppression of political party expression.[16] In adopting this interpretation, the court of appeals has implicitly determined that it is somehow "unfair" for NRSC to engage in effective political fundraising and advocacy when DSCC has been unable, through its own efforts, to render equally effective services to Democratic candidates.[17] Yet the desire to equalize the resources and

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cretion to decide in what manner party funds will be most effectively utilized, and it is in no way compelled to designate an agent if it does not wish to so do.

[16] The record below reveals that DSCC's complaint is directed at the ability of NRSC to campaign effectively on behalf of senatorial candidates. In the district court, DSCC argued that, because of NRSC's agency agreements with state committees, it is more likely "to influence the outcome of elections for the United States Senate." Petitioner's Memorandum in Support of Summary Judgment, at R. 4-20. Although no expenditure ceiling has been violated, DSCC nevertheless complains that "agency agreements have clearly resulted in Republican candidates obtaining the benefits of hundreds of thousands of dollars that would otherwise have not been available." *Id.* at R. 4-4.

[17] The legislative history of H.R. 11315, § 313, *see* note 29 *supra*, is illustrative. The practical effect of this legislation would have been to render the agency agreements at issue here illegal. Both Democrats and Republicans, however, recognized that the provision was intended solely to deprive the Republican Party of its ability to engage in effective fundraising and political advocacy. *See generally*, 124 Cong. Rec. H2261-69 (daily ed. Mar. 21, 1978). According to Representative Davis, the bill "says that our [Democratic] Party has not done its job in fulfilling its obligation to raise money. So what do we do? We come in and we try to place limitations on

thereby the expression of political parties is forbidden by the First Amendment. *Buckley* plainly states that the constitutional guarantee of free political expression "denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." 424 U.S. at 57. As construed by the court of appeals, § 441a(d)(3) restricts the ability of political parties to make expenditures on behalf of its nominated candidates and is inconsistent with *Buckley's* teaching that there "is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate." *Id.* at 56.

3. A proper construction of 2 U.S.C. § 441a(d)(3) avoids unconstitutional restrictions of the freedoms of expression and association.

The court of appeals construction of § 441a(d)(3), which is inconsistent with the interpretation of the district court and the unanimous FEC, is at odds with both the plain meaning of the statute and the First Amendment requirements articulated in *Buckley*. Its practical effect is to deny one political party freedom to engage in legitimate campaign advocacy on behalf of its candidates for public office. When a statute is susceptible of two interpretations, it must be read in the manner most consistent with the exercise of constitutional rights. *See Califano* v. *Yamaski*, 442 U.S. 682, 693 (1979). In a case such as this, where First Amendment rights are at stake, a reviewing court must interpret the statute at

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it. . . . The problem is that our party did not do the job, so we changed the rules in the middle of the ball game." *Id.* at H2266. The Democratic majority offered to withdraw the provision because, according to Majority Leader Wright, "we ought not craft a bill deliberately in a way that would predetermine the outcome of an election as between one party and the other." *Id.* at H2268.

issue to permit the maximum amount of unrestrained political expression possible in light of the substantial legislative purpose, if any. *See DSCC* v. *FEC*, at A39 (Wilkey, J., dissenting); *Federal Election Commission* v. *Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980) (*en banc*) (*per curiam*). The court of appeals disregarded these maxims of statutory construction and incorporated into § 441a(d)(3) a novel prohibition of political expression and association not evident in its plain language. This Court should reinstate the statutory interpretation that reflects both the plain meaning of § 441a(d)(3) and the dictates of the First Amendment.[11]

C. The Court Of Appeals *De Novo* Review Of The FEC's Decision To Dismiss DSCC's Complaint Conflicts With The Standard Of Limited Judicial Review Provided In FECA and Fails To Defer To The FEC's Longstanding Interpretation Of Its Governing Statute.

FECA provides that the FEC has exclusive jurisdiction[12] over enforcement of the statute. 2 U.S.C.

[11] The court of appeals decision that § 441a(d)(3) prohibits agency agreements places NRSC in the position of violating § 441a, which may constitute a criminal offense punishable by fine and imprisonment. 2 U.S.C. § 437g(d)(1)(A). "Close examination of the specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests." Buckley, *supra*, 424 U.S. at 40-41 (citations omitted). To avoid unconstitutional vagueness, § 441a(d)(3) must contain language that "affords the '[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms.'" *Id.* at 41 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)). Under the court of appeals construction, § 441a(d)(3) is unconstitutionally vague since it does not, on its face, provide a precise prohibition of agency agreements.

[12] Congress gave the FEC "exclusive primary jurisdiction with respect to the civil enforcement of Federal election laws." H.R.

§ 437c(b)(1). This express congressional grant of exclusive jurisdiction entitles FEC decisions "to great respect by the courts because of the extremely delicate nature of the tremendous power entrusted to it." *In re Carter-Mondale Reelection Committee, Inc.*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9132, at 51,038 (D.C. Cir. Sept. 12, 1980). Judicial restraint is required since the FEC is "vested with a wide discretion in order to guarantee that it will be sensitive to the great trust imposed in it to not overstep its authority by interfering unduly in the conduct of elections." *Id.; see DSCC* v. *FEC*, at A20-A21 n.2 (Wilkey, J., dissenting).

As a result, judicial review of the FEC's dismissal or failure to act with regard to a complaint "is limited." *Hampton* v. *Federal Election Commission*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9036, at 50,439-40 (D.D.C. Apr. 15, 1977), *aff'd mem.*, No. 77-1546 (D.C. Cir. July 21, 1978); *accord, In re Carter-Mondale Reelection Committee, Inc., supra*, ¶ 9132, at 51,038. A court may not substitute its judgment for that of the FEC and may set aside FEC action only if it acted in a manner "which was arbitrary or capricious, was an abuse of discretion or was otherwise contrary to law." *Hampton, supra*, ¶ 9036, at 50,444; *see* 2 U.S.C. § 437g(a)(8)(C); *DSCC* v. *FEC*, at A20 (Wilkey, J., dissenting).[40] The FEC's

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Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. 35, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1976, at 1029 (1977). Any complaint "bottomed on an alleged violation" of the campaign financing laws is within the "exclusive competence" of the FEC and "all other tribunals must therefore 'yield to the primary jurisdiction' " of the agency. H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 4, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1976, at 804 (1977).

[40] The court of appeals declined to engage in a limited review of the FEC's decision to dismiss DSCC's complaint on the basis that

decision to dismiss DSCC's complaint has a reasonable basis in law. The court of appeals *de novo* review abrogates the congressional grant of exclusive jurisdiction and undermines the FEC's "discretionary power 'to determine' whether or not a civil violation has occurred." *Buckley, supra*, 424 U.S. at 112 n.153.

In addition to failing to engage in a limited review, the court of appeals erred by refusing to defer to the FEC's interpretation of its governing statute and to recognize that its First General Counsel's Report provided a basis for the FEC's decision. It is by now a "commonplace" rule that " 'when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.' " *Environmental Protection Agency* v. *National Crushed Stone Association*, 49 U.S.L.W. 4008, 4013 (U.S. Dec. 2, 1980) (No. 79-770) (quoting *Udall* v. *Tallman*, 380 U.S. 1, 16 (1966)). When Congress delegates "broad administrative lawmaking power," the statute is best construed by the agency which gives it substance. *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 559 (1980). In a recent case involving construction of the federal election laws, the District of Columbia Circuit affirmed the importance of deferring to the FEC's past practices, especially when, as here, "its interpretation is supported

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this case does not involve a discretionary exercise of FEC power, but an interpretation of a federal statute. DSCC v. FEC, at A8. However, the rule requiring limited review of FEC action extends to interpretation of the federal election laws. *See, e.g., In re* Carter-Mondale Reelection Comm., Inc., *supra*, ¶ 9132, at 51,037; Hampton, *supra*, ¶ 9036, at 50,439-40; Gelman v. FEC, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9132, at 51,020 (D.C. Cir. July 18, 1980), *cert. denied*, 49 U.S.L.W. 3227 (U.S. Oct. 6, 1980) (No. 80-209).

by the language and overall purpose of the statute being construed." *Gelman, supra*, ¶ 9130, at 51,020-21; *accord, DSCC* v. *FEC*, at A20 n.1 (Wilkey, J., dissenting). The FEC decision upholding the agency agreements is "in accord with the precedent established over the lifetime of the practice of delegation by both the national and state committees." *Id.* at A29.[41] The FEC's finding of "no reason to believe" that NRSC violated FECA in making expenditures under § 441a(d)(3) as agent of Republican state committees is entitled to deference by reviewing courts and should be upheld.

CONCLUSION

For the foregoing reasons, Petitioner National Republican Senatorial Committee respectfully prays that the judgment below be reversed.

Respectfully submitted,

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[41] *See* Advisory Opinion 1976-108, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5236 (Feb. 15, 1977); *In re* National Republican Senatorial Comm., FEC Matter Under Review 780 (agency agreements between NRSC and RNC and NRSC and Montana Republican State Committee did not violate § 441a(d)(3)); *In re* National Republican Senatorial Comm., FEC Matter Under Review 820 (agency agreements between NRSC and RNC and NRSC and Alabama Republican Party did not violate § 441a(d)(3)).

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No. 80-939

In the Supreme Court of the United States

OCTOBER TERM 1980

FEDERAL ELECTION COMMISSION, PETITIONER

v.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

(1) Whether a Commission determination to dismiss an administrative complaint requires affirmance where the determination was based upon a consistent, reasonable construction of FECA.

(2) Whether the Commission's consistent interpretation of 2 U.S.C. § 441a(d)(3) as not prohibiting intra-party agency agreements requires affirmance by this Court.*

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* In addition to the parties named in the caption, the other party to the proceeding below was the National Republican Senatorial Committee, Intervenor.

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In the Supreme Court of the United States

OCTOBER TERM 1980

No. 80-939

FEDERAL ELECTION COMMISSION, PETITIONER

v.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The October 9, 1980, opinion of the court of appeals is not yet officially reported but appears at Appendix C of the Federal Election Commission's Petition for a Writ of Certiorari at 26 ("FEC Pet. App. — at ———"). The order and opinion of the district court (FEC Pet. App. B at 21) is not officially reported. The determination of the Commission dismissing respondent's complaint (FEC Pet. App. A at 17) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1980. FEC Pet. App. D at 70. The

court's *sua sponte* order for the immediate issuance of the mandate was also entered on October 9, 1980. FEC Pet. App. E at 72. A petition for rehearing, application to recall mandate, and suggestion for rehearing en banc were denied on October 11, 1980. FEC Pet. App. F, G at 73, 74. The petition for a writ of certiorari was filed on December 10, 1980, and was granted on March 2, 1981.[1] Jurisdiction is conferred by 2 U.S.C. § 437g(a)(9), 28 U.S.C. § 1254 (1)(1980).

STATUTES INVOLVED

2 U.S.C. § 437g(a)(8), (9) provides in pertinent part:

> (8)(A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1) . . . may file a petition with the United States District Court for the District of Columbia. . . .
>
> (C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint . . . is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.
>
> (9) Any judgment of a district court under this subsection may be appealed to the court of ap-

[1] The National Republican Senatorial Committee ("NRSC") was permitted to intervene by the court of appeals. *See* Joint Appendix ("J.A.") at 2. Thereafter, NRSC petitioned the Court for a writ of certiorari separate from the Commission's petition. *See* J.A. Cover. On March 2, 1981, the Court granted both petitions and consolidated Nos. 80-939, 80-1129 for oral argument.

peals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

2 U.S.C. § 441a(d)(3) provides: [2]

> (3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—
>
> (A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—
>
> (i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or
> (ii) $20,000; and
>
> (B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner of any other State, $10,000.

2 U.S.C. § 441a(a)(4) provides in pertinent part:

> (4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political com-

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[2] The full text of 2 U.S.C. §§ 437g, 441a is reproduced in the Appendix hereto.

mittees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party. . . .

STATEMENT OF THE CASE

This case arose when the Democratic Senatorial Campaign Committee ("DSCC") challenged in federal district court the determination of the Federal Election Commission ("the Commission" or "the FEC") not to open an investigation but to dismiss an administrative complaint which had been filed with the Commission by DSCC. 2 U.S.C. § 437g (a) (1).[3] In its administrative complaint filed May 9, 1980, DSCC alleged that the National Republican Senatorial Committee ("NRSC") had violated the Federal Election Campaign Act[4] ("FECA" or "the Act") by making expenditures in support of various Republican senatorial candidates at the request of and as agents for certain state Republican Party committees within the limits of 2 U.S.C. § 441a (d) (3).[5] DSCC contended that such intra-party ar-

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[3] *See* note 2 *supra.*

[4] The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974); by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976); by the Federal Election Campaign Act Amendments of 1977, Title V, Sec. 502, Pub. L. No. 95-216, 91 Stat. 1655 (1977); and by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980). The relevant provisions of the Act are codified in Title 2, United States Code.

[5] *See* note 2, *supra.* NRSC also has an intra-party agency agreement with the Republican National Committee ("RNC") for the expenditure of funds under § 441a(d) (3). However,

rangements violated the plain meaning of § 441a (d) (3) and frustrated the statutory purpose of promoting the development of state party organizations. FEC Pet. App. C at 30. The Commission unanimously determined, by a 6-0 vote, on July 11, 1980, that there was "no reason to believe" that NRSC had violated FECA as alleged in the DSCC complaint. FEC Pet. App. A at 17. The Commission's dismissal of the DSCC complaint was consistent with two prior enforcement matters in which the FEC had been urged to construe § 441a(d)(3) to prohibit NRSC's intra-party agency agreements. *See* Certifications, Matters Under Review ("MURs") 780 and 820, FEC Pet. App. A at 18, 19.[6]

DSCC did not challenge this intra-party agency agreement. DSCC itself has a similar agreement with the Democratic National Committee ("DNC"). Thus, DSCC's administrative complaint, the Commission's consideration of DSCC's complaint, and both the district court's and the appellate court's review were limited to the propriety of intra-party agency agreements between NRSC and state Republican Party committees. *See* FEC Pet. App. C at 30.

[6] MUR 780 concerned expenditures made by NRSC during the Montana senatorial campaign of Republican candidate Larry Williams. MUR 820 reviewed NRSC's expenditures made as the agent of the Alabama Republican Party Committee in support of the candidacy of James Martin. Thus, as early as January 19, 1979, the Commission unanimously found "no reason to believe" that NRSC had violated FECA by acting as the agent of these state Republican Party committees in making § 441a(d)(3) expenditures. A Commission Advisory Opinion, AO 1976-108, provided a basis for the Commission's determinations in these MURs. AO 1976-108, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5236, concluded that the National Republican Congressional Committee ("NRCC") could, consistent with FECA, expend its own funds in support of Republican Congressional candidates as the agent for RNC.

DSCC filed its petition for review of the Commission's determination with the United States District Court for the District of Columbia on July 30, 1980. Based upon cross motions for summary judgment and full oral argument, the district court affirmed. FEC Pet. App. B at 21. The court granted the Commission's motion for summary judgment; noted the deference to be accorded the Commission's determinations; and concluded that the Commission's dismissal of DSCC's administrative complaint was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. *Id.* at 22-25.[7]

DSCC appealed the order of the district court on September 3, 1980, and requested an expedited briefing and argument schedule in the court of appeals.[8] The court of appeals ordered that the Commission file its brief on September 22, 1980, that oral argument be held on September 23, 1980, and that DSCC file its reply brief after oral argument. Following oral argument, the court (through both the clerk's office and the court's chief staff counsel) requested specific additional evidentiary submissions from the parties[9] and, on October 9, 1980, in a per curiam

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[7] *See* 2 U.S.C. § 437g(a)(8)(C), Appendix, *infra*. The district court's interpretation of the contrary to law standard mandated by § 437g(a)(8)(C) as requiring reversal of only those Commission determinations which are arbitrary or capricious is consistent with the standard employed in all previous actions reviewing Commission determinations. *See* Argument I, *infra*.

[8] *See* 2 U.S.C. § 437g(a)(10), Appendix, *infra*.

[9] In response to a request made during oral argument, the Commission submitted citations to legislative history from the 1974 and 1976 FECA Amendments concerning the role of the national senatorial and congressional campaign com-

opinion, reversed the district court judgment, declaring the Commission's action to be contrary to law. 2 U.S.C. § 437g(a)(8)(C). Concluding that the Commission had presented no reasoned explanation for its determination,[10] the court decided the issue *de novo*. FEC Pet. App. C at 37. The court held that neither the language of the statute nor its legislative history could support the Commission's interpretation that Congress did not intend to prohibit agency agreements as employed by the Republican Party committees, including NRSC.[11] In addition, the court issued its

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mittees within the political party structure. *See* Appendix hereto at 28a. And pursuant to the October 1, 1980 request of the court, the Commission submitted Commission certifications and final General Counsel's Reports for MURs 780 and 820. *See* Appendix hereto at 30a, 32a. Finally, upon inquiry transmitted by the court's chief staff counsel, the Commission, on October 7, 1980, submitted information concerning DSCC's having acted as an agent on the national level for the purpose of making § 441a(d) expenditures. *See* Appendix hereto at 34a.

[10] FECA only requires the Commission to decide whether to prosecute and does not require the Commission to issue a formal statement of the reasons supporting determinations in enforcement matters. *See* 2 U.S.C. § 437g, Appendix, *infra*. Commission decisions in enforcement matters are accompanied by a General Counsel's Report analyzing the factual and legal issues raised by the complaint for the Commission, which have been accepted as support for Commission determinations. *See* note 18, *infra*.

[11] Judge Wilkey dissented, recognizing that § 441a(d)(3) does not prohibit the intra-party agency arrangement. Viewing DSCC's challenge as one of form over substance, he noted that since party committees may transfer money pursuant to 2 U.S.C. § 441a(a)(4), it made no difference if the state committees sent money directly to the national committee or authorized the national committee to make expenditures on

mandate that same day, directing the Commission to conform forthwith with its decision that the intra-party agreements violated FECA. FEC Pet. App. E at 72. *See* Rule 41(a) F.R.A.P.

On October 10, 1980, while the Commission was endeavoring to conform with the court's decision within the 30-day statutory deadline,[12] intervenor NRSC filed an application to recall mandate and a petition for rehearing and suggestion for rehearing *en banc* which were denied on October 11, 1980. On October 17, 1980, the Chief Justice issued a stay of the appellate court's judgment, FEC Pet. App. H at 76, and on October 21, 1980, the full court denied DSCC's motion to vacate the stay.[13] J.A. at 8, 9.

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their behalf. In either case, Judge Wilkey concluded, the money would be spent and collected by a designated committee within the overall limitations of the Act. In addition, he warned that the strong legislative intent that campaign funds flow freely among political committees of the same party would be frustrated by the court's decision. FEC Pet. App. C at 53.

[12] 2 U.S.C. § 437g(a)(8)(C) provides that the court may direct the Commission to conform with its finding that the Commission acted contrary to law within 30 days. However, the Commission is prohibited by FECA from proposing new rules of law or regulations except in accordance with the procedures established by Congress. 2 U.S.C. §§ 437f(b), 438(d). FECA's rulemaking procedures cannot be completed within 30 days. *See Clark* v. *Valeo*, 559 F.2d 642 (D.C. Cir. 1977), *aff'd sub nom. Clark* v. *Kimmitt*, 431 U.S. 950 (1977).

[13] In issuing a stay, the Court considers:

> (a) whether irreparable injury may occur absent a stay; (b) the probability that the Court of Appeals was in error in holding that the merits of these controversies were appropriate for decision by federal courts; and (c) the public interests that may be affected by the operation of the judgments of the Court of Appeals.

O'Brien v. *Brown*, 409 U.S. 1, 3 (1972).

SUMMARY OF ARGUMENT

The question presented for this Court's review is whether congressional intent to establish the Federal Election Commission with exclusive jurisdiction to administer and enforce the Federal Election Campaign Act is abrogated where the court of appeals substitutes its judgment, reversing a consistent construction of 2 U.S.C. § 441a(d)(3) in the setting of a Commission enforcement action. Congressional intent is clear as to the exclusivity of the Commission's enforcement and administrative authority. 2 U.S.C. §§ 437c(b), 437d(e). *See also Cort* v. *Ash*, 422 U.S. 66 (1975).

The enforcement procedures enacted by Congress by which the Commission determines, upon review of an administrative complaint, whether there is "probable cause to believe" that a violation of the Federal Election Campaign Act has occurred reflect congressional recognition of the potential political sensitivity of Commission enforcement determinations. 2 U.S.C. § 437g; *Durkin For U.S. Senate Committee* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9147 at 51,113 (D.N.H. 1980). Thus, the Commission, composed of six voting members, no more than three of whom may be of the same political party, may find "probable cause to believe" or initiate a civil enforcement suit only by the affirmative vote of four voting members. 2 U.S.C. §§ 437c(c) and 437g(a)(2), (4)(A)(i), (6)(A). And the Commission may dismiss complaints in the same manner or by failing to provide the four votes necessary to continue an enforcement matter.

Moreover, consistent with congressional intent to minimize the potential political effect of Commission enforcement determinations, FECA requires that investigations conducted pursuant to 2 U.S.C. § 437g

be confidential. 2 U.S.C. § 437g(a)(12). Once an enforcement matter is concluded, the Commission must notify the parties and put the entire investigative file, with the exception of information provided during an attempted conciliation, on the public record. 2 U.S.C. § 437g(a)(4)(B), 11 C.F.R. § 111.20.

The Commission followed Congress's mandate in this case. After the Democratic Senatorial Campaign Committee filed an administrative complaint, the Commission considered the allegations therein and unanimously determined that there was "no reason to believe" that a violation of FECA had occurred as alleged. In doing so, the Commission considered a General Counsel's Report which analyzed the factual and legal issues raised by the complaint and which recommended the action taken by the Commission. General Counsel's Reports have been accepted as support for Commission determinations. *Hampton* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9036 at 50,439-40 (D.D.C. 1977), *aff'd* No. 77-1546 (D.C. Cir. July 21, 1978) (unpublished opinion). *See also Brown* v. *Federal Election Commission*, No. 79-0940 (D.D.C. July 17, 1980), *appeal docketed*, No. 80-2108 (D.C. Cir. Sept. 15, 1980); *In re Federal Election Campaign Act Litigation*, 474 F. Supp. 1044, 1046 (D.D.C. 1979). *Accord, National Conservative Political Action Committee* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9057 (D.D.C. 1978), *aff'd as modified on other grounds*, 626 F.2d 953, 956 n.8 (D.C. Cir. 1980). The Commission then closed its file on the matter and put the file on the public record.

Upon DSCC's petition, the United States Court of Appeals for the District of Columbia reversed the

district court's affirmance of the Commission's action and, concluded that

> [w]e deal in this case not with a discretionary exercise of Commission power, but with an interpretation of a federal statute,

FEC Pet. App. C at 33, and substituted its judgment as to the proper construction of the statute for the Commission's. The court took this extraordinary action despite the fact that established precedent in the District of Columbia Circuit had extended judicial deference to the Commission's expert statutory interpretations. *National Conservative Political Action Committee* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide at 50,915 n.7, adopting the reasons stated by the lower court. *See also, In re Carter-Mondale Reelection Committee*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9132 at 51,037 (D.C. Cir. 1980); *Hampton* v. *Federal Election Commission, supra; Gelman* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9130 at 51,020 (D.C. Cir. 1980), *cert. denied*, 49 U.S.L.W. 3227 (October 6, 1980). Although the Commission might have interpreted the statute in the same manner as the court of appeals, this Court has

> consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority.

Mourning v. *Family Publications Service, Inc.*, 411 U.S. 356, 371 (1973), citing *Northwestern Electric Co.* v. *Federal Power Commission*, 321 U.S. 119, 124

(1944); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224 (1943); *American Telephone & Telegraph Co.* v. *United States*, 299 U.S. 232, 236 (1936).

In disagreeing with the Commission's consistent interpretation of 2 U.S.C. § 441a(d)(3), the court of appeals has required that the Commission develop a new rule of law or statutory interpretation in the context of an administrative investigation. However, Congress has specifically provided other procedures, Advisory Opinions and Rulemaking, more properly designed for the type of "reasoned explanation" desired by the court of appeals. FEC Pet. App. C at 34. Thus, Congress has authorized the Commission to "render advisory opinions," 2 U.S.C. § 437d (a)(7), and to "prescribe rules, regulations and forms to carry out the provisions" of the Act. 2 U.S.C. §§ 437d(a)(8), 438(a)(8). Congress sculpted these procedures to ensure that Commission interpretive decisions are fully supported by the Act or its legislative history and open to public comment. And this Court has recognized rulemaking procedures as the best method for construing a statute or establishing new standards; they are designed to fill the interstices of a statute, *Securities and Exchange Commission* v. *Cheney Corp.*, 332 U.S. 194, 202 (1947), and to "promulgat[e] policy type rules or standards." *United States* v. *Florida East Coast R. Co.*, 410 U.S. 224, 245 (1973). Indeed, the Commission's advisory opinion process has been viewed as a ". . . prompt means of resolving doubts with respect to the statute's reach." *Martin Tractor Co.* v. *Federal Election Commission*, 627 F.2d 375, 384 (D.C. Cir. 1980), *cert. denied sub nom, National Chamber Alliance for Politics* v. *Federal Election*

Commission, —— U.S. ——, 100 S.Ct. 360 (1980). Moreover, DSCC itself is familiar with the procedure for petitioning the Commission to institute rulemaking, 5 U.S.C. § 553(e), having been a party to the first and only such petition filed thus far with the Commission. *See* note 31, *infra*.

In any event, the Federal Election Commission's interpretation of 2 U.S.C. § 441a(d) as not prohibiting intra-party agency agreements is not contrary to law. The question presented to the Commission in DSCC's administrative complaint was whether one party committee (a state committee) violated 2 U.S.C. § 441a(d) by designating another party committee (a national committee) for purposes of expenditure limitations contained in § 441a(d)(3). The court of appeals concluded that because NRSC was not specifically identified in § 441a(d)(3) and because the statute does not specifically allow the intra-party agency agreements in question, the statute "seems to preclude" the agreement. FEC Pet. App. C at 39. However, this Court has concluded that "absent a clear expression, it becomes necessary to consider the implicit character of the statutory scheme . . . and it is appropriate to defer to the [agency] in determining what resolution of that issue is implied. . . ." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 560 (1980). *See also Citizens and Southern National Bank* v. *Bougas*, 434 U.S. 35 (1977) ("[o]ur experience with the inexactitude of congressional language, an inexactitude that perhaps often is inevitable . . . [citing *Buckley* v. *Valeo*, 424 U.S. 1 (1976)] does not convince us that much weight can be attached to the use of "any" and "the" respectively . . ."). *Id.* at 45. *See* note 36, *infra*; FEC Pet. App. C at 43 n.34.

Not only does the statutory language not prohibit intra-party agreements but an interpretation of § 441 a(d) which would prohibit such agreements would conflict with the intent of Congress, for it is clear that Congress, both in 1976 and most recently in 1980, meant to encourage a close working relationship within the political party structure and among the various political party committees. Thus, Congress provided that the limitations on contributions were not to apply to "transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party." 2 U.S.C. § 441a(a)(4). *See also* 2 U.S.C. § 441a(a)(5)(B). Because transfers of funds between the political committees of a party are free from any contribution limitations and are permitted without limit, it is clear that Congress perceived the various committees within the parties to be closely connected units and wished to encourage their working toward a common purpose. See also H.R. 11315, 95th Cong., 1st Sess. (1978), H.R. Rep. No. 95-982, 95th Cong. 2d Sess. (1978). Section 113 of H.R. 11315 would have prohibited any "movement of funds" between "the political committees of a national political party (including House and Senate congressional campaign committees of such party) and the political committees of a State political party (including district, local, or subordinate committees of such party) for the purpose of making contributions to, or expenditures on behalf of any candidate for Federal office." The House, however, rejected the rule for consideration of the bill. *See* 124 Cong. Rec. H 2261-69 (daily ed. Mar. 21, 1978).

By considering an amendment to FECA which would have the effect of prohibiting NRSC from

transfering funds to state committees to enable the state committees to effect § 441a(d) expenditures, the House recognized that FECA as it now stands does not limit such transfers. By not adopting the proposed amendment, the House left the decision as to the proper mechanism for § 441a(d) expenditures to the political parties themselves. And, as this Court has recognized, reenactment of a statute without change in its language indicates approval of interpretations rendered prior to the reenactment. *National Labor Relations Board* v. *Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 351 (1953); *Helvering* v. *Griffiths*, 318 U.S. 371, 395 (1943). The Commission's construction of 2 U.S.C. § 441a(d)(3) was thus consistent with statutory language, Commission regulations and Advisory Opinions and Congressional legislative history. This Court should affirm the Commission's decision, reversing the judgment of the court of appeals.

ARGUMENT

I. THE COMMISSION'S DECISION TO DISMISS AN ADMINISTRATIVE COMPLAINT BASED UPON A REASONABLE CONSTRUCTION OF FECA REQUIRES AFFIRMANCE.

This case presents an important question concerning the Federal Election Commission's exclusive role as the expert body established by Congress to administer, enforce and interpret the Federal Election Campaign Act. This Court has already recognized that

> the Commission, which has "primary jurisdiction" with respect to civil enforcement, § 437c(b), has the sole discretionary power "to determine" whether or not a civil violation has occurred or is about to occur, and consequently

> whether or not informal or judicial remedies will be pursued.

Buckley v. *Valeo*, 424 U.S. 1, 112 n.153 (1976).[14] Moreover, Congress has very carefully established the Commission, consistent with this Court's ruling in *Buckley* v. *Valeo*, *supra*, as an expert agency vested with exclusive responsibility for the coherent administration and enforcement of FECA. As recognized by Judge Wilkey:

> Deference to the Commission's view on election law policy and what constitutes compliance seems particularly advised in that events occur very quickly in an election year. The Commission is the expert body charged by Congress with the coherent administration of elections and must, therefore, be competent to reach expeditious and equitable judgments drawing reason out of a melange of vaguely consistent election laws obviously adopted by the process of political compromise on this highly charged political field; it is the Commission which is prepared to read the body of election law as a whole. Moreover, the Commission is self-consciously bipartisan. Congress created a Commission, 2 U.S.C. § 437c (1976), which could make sensitive political decisions cognizant of bipartisan exigencies. Courts should tread lightly on these matters of party politics.

FEC Pet. App. C at 47 n.2.

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[14] FECA now vests the Commission with "*exclusive jurisdiction* with respect to the civil enforcement" of the Act. 2 U.S.C. § 437c(b). (emphasis added). *See In re Carter-Mondale Reelection Committee*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9132 at 51,039 n.9 (D.C. Cir. 1980).

The Commission's statutory and regulatory interpretations, especially within the context of the enforcement process, are the Commission's principal administrative tools to ensure uniform application and enforcement of FECA. Such determinations must be given great weight. As this Court observed in another statutory context,

> to accomplish its desired objective, Congress determined to lay the structure of the Act broadly and to entrust its construction to an agency with the necessary experience and resources to monitor its operation.

Mourning v. *Family Publications Service, Inc.*, 411 U.S. 356, 365 (1973). The court of appeals, by reversing the Commission's decision not to proceed with an administrative investigation which was based upon its construction of the statute, has thwarted Congressional intent.

A. Congress Intended that the Commission, Through FECA's Enforcement Process, Provide Uniform Application of the Statute as Enacted.

The Federal Election Commission was created by statute in 1974 as the agency with exclusive authority to "administer, seek to obtain compliance with, and formulate policy with respect to [FECA]." 2 U.S.C. § 437c(b). In order to provide centralization and uniformity, the Commission has been vested with exclusive jurisdiction for civil enforcement of the Act. 2 U.S.C. §§ 437c(b)(1), 437d(e).[15] *See also*

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[15] U.S.C. § 437c(b)(1) states:

> The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and chapter 95 and chapter 96 of title 26. The Com-

Cort v. *Ash*, 422 U.S. 66 (1975). To implement the Commission's enforcement authority, Congress enacted detailed administrative enforcement procedures designed to ensure the impartial disposition of complaints in the highly charged atmosphere of pending federal elections. *Durkin for U.S. Senate Committee* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9147 at 51,113 (D.N.H. 1980). Any person who believes a violation of the Act has occurred may file a complaint with the Commission. The Commission must notify any person alleged to have committed such a violation and provide such person 15 days to demonstrate that no action should be taken on the basis of the complaint. 2 U.S.C. § 437g (a)(1). Only if the Commission then votes to find "reason to believe" a violation has occurred, may it proceed to an investigation of such alleged violation.[16] 2 U.S.C. § 437g(a)(2).

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mission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.

2 U.S.C. § 437d(e) states:

Except as provided in section 437g(a)(8) of this title, the power of the Commission to initiate civil actions under subsection (a)(6) of this section shall be the exclusive civil remedy for the enforcement of the provisions of this Act.

[16] One court has recognized that:

The issue of whether a particular charge merits an investigation is a sensitive and complex matter calling for an evaluation of the credibility of the allegation, the nature of the threat posed by the offense, the resources available to the agency, and numerous other factors. Congress has wisely entrusted this matter to the discretion of the [FEC] and instructed the courts to interfere only when the Commission's actions are "contrary to law."

In re Federal Election Campaign Act Litigation, 474 F. Supp. 1044, 1045-6 (D.D.C. 1979).

The Commission, uniquely structured, is composed of six voting members, 2 U.S.C. § 437c(a)(1). The Commission does not itself adjudicate whether or not a violation has occurred.[17] Rather, the Commission is authorized to vote initially on whether there is "reason to believe" a violation has occurred, and following an investigation, the Commission determines whether there is "probable cause to believe" and must attempt to reach a conciliation agreement with respondents. Only if concilation fails, may the Commission seek adjudication in court. 2 U.S.C. § 437g (a)(6)(A).

To make the necessary judgment of whether to invoke its investigative and prosecutorial authority, Congress has placed reliance on the experience and expertise of the six voting members of the Commission, no more than three of whom may be of the same political party. Pursuant to 2 U.S.C. §§ 437c(c) and 437g(a)(2), (4)(a)(i), (6)(A), there must be four

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[17] One commentator has suggested that the Commission "misconceives" its function as a non-adjudicatory body. Note, *The Federal Election Commission: The First Amendment and Due Process*, 89 Yale L.J. 1199, 1203 (1980). However, it is clear that Congress has carefully crafted FECA's enforcement procedures and defined the Commission's role therein as one of investigation, encouraging voluntary compliance and conciliation, and prosecution of violations in federal district courts. Thus, FECA does not authorize the Commission to *impose* civil penalties or admissions of violations, *id.* at note 31, and Commission determinations, even at the "probable cause" stage of an investigation, remain investigatory and prosecutorial since FECA limits Commission findings to "reason to believe" and "probable cause to believe" that a violation has occurred. 2 U.S.C. § 437g, Appendix, *infra*. Congress has explicitly provided that only a federal district court will determine that a violation has occurred. 2 U.S.C. § 437g (a)(6)(A), Appendix, *infra*.

affirmative votes to find "probable cause to believe" or to initiate a civil suit. The Commission may dismiss complaints either by an affirmative vote by four of the six voting members or by failing to provide the four votes necessary to continue an enforcement matter. Once a matter is dismissed, the Commission is required to notify the parties and to put the file on the public record. 2 U.S.C. § 437g(a)(4)(B)(ii), 11 C.F.R. § 111.20.[18] When the Commission dismisses a complaint, aggrieved complainants may seek a judicial determination that the dismissal was contrary to law. 2 U.S.C. § 437g(a)(8).[19]

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[18] The per curiam opinion of the court of appeals indicated that FECA's requirement that the Commission's investigative file, including all General Counsel's Reports to the Commission, be made public at the close of an investigation is insufficient to support the Commission action either for the purposes of public disclosure or for a reviewing court. FEC Pet. App. C at 34 n.23. However, the United States Court of Appeals for the District of Columbia Circuit had previously held that the General Counsel's Report to the Commission *is sufficent* to support the Commission's dismissal of an administrative complaint. *Hampton* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9036 at 50,439-40 (D.D.C. 1977), *aff'd* No. 77-1546 (D.C. Cir. July 21, 1978) (unpublished opinion). *See also National Republican Senatorial Committee* v. *Federal Election Commission*, No. 80-2266 slip op at 4 n.14 (D.D.C. March 5, 1981); *Brown* v. *Federal Election Commission*, No. 79-0940 (D.D.C. July 17, 1980), *appeal docketed*, No. 80-2108 (D.C. Cir. Sept. 15, 1980); *In re Federal Election Campaign Act Litigation*, 474 F. Supp. at 1046. *Accord, National Conservative Political Action Committee* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9057 (D.D.C. 1978), *aff'd as modified on other grounds*, 626 F.2d 953, 956 n.8 (D.C. Cir. 1980).

[19] *See* Statutes Involved, *supra* at 2, for the text of 2 U.S.C. § 437g(a)(8)(C).

Congress intended that a court, reviewing a Commission determination to dismiss an administrative complaint, should reverse that determination only if it is found "arbitrary or capricious or otherwise contrary to law." *Buckley* v. *Valeo*, 424 U.S. at 113 n.154; 5 U.S.C. § 701.[20] The court of appeals in this case, however, ignored Congress's clear intent that a high level of deference be accorded Commission enforcement determinations. Rather, the court reversed the Commission's determination that an enforcement action was not warranted because it disagreed with the Commission's construction of the statute. It thus concluded:

> We deal in this case not with a discretionary exercise of Commission power, but with an interpretation of a federal statute.

FEC Pet. App. C at 33. The court ignored the fact that the Commission's interpretation of the statute in question was in the context of a determination not to proceed with an administrative investigation, a classic discretionary power. *City of Chicago* v. *United States*, 396 U.S. 162, 165 (1969) ("[w]hether the Commission should make an investigation . . . is of

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[20] The "arbitrary and capricious" standard has been recognized as the appropriate mode of reviewing Commission determinations. *See In re Carter-Mondale Reelection Committee*, 2 Fed. Elec. Camp. Fin. Guide at 51,036; *National Republican Senatorial Committee* v. *Federal Election Commission*, *supra*, slip op. at 3. *Brown* v. *Federal Election Commission*, *supra*, slip op. at 2; *International Association of Machinists and Aerospace Workers* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9144 at 51,105 (D.D.C. 1980) *appeal docketed*, No. 81-1044 (D.C. Cir. January 14, 1981); *Hampton* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide at 50,439-40.

course within its discretion, a matter which is not reviewable"); *General Protective Committee* v. *Securities and Exchange Commission*, 346 U.S. 521, 533 (1954) (a statutory provision that the SEC upon request "may" apply to a court for enforcement of a plan implies "the exercise of discretion" and the considerations governing such exercise "embraces a variety of factors"); *General Motors Corporation* v. *Federal Energy Regulatory Commission*, 613 F.2d 939, 944 (D.C. Cir. 1979) ("an administrative agency's decision to conduct or not to conduct an investigation is committed to the agency's discretion"). *See also Union Mechling Corporation* v. *United States*, 566 F. 2d 722, 724 (D.C. Cir. 1977).[21]

Although the Commission might have concluded, as did the court of appeals, that § 441a(d)(3) could be

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[21] Established precedent in the District Court of Columbia Circuit had extended judicial deference to the Commission's expert statutory interpretations:

> At the outset, the Court is mindful that an agency's interpretation of its own enabling legislation is entitled to great weight from the courts. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974). Regulation 110.1(g)(1) is the product of a consistent course of decision-making by the FEC, and is deserving of deference from the Court unless clearly repugnant to the provisions of the Federal Election Campaign Act.

National Conservative Political Action Committee v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide at 50,915 n.7, adopting the reasons stated by the lower court. *See also In re Carter-Mondale Reelection Committee, Inc.*, 2 Fed. Elec. Camp. Fin. Guide at 51,037; *Hampton* v. *Federal Election Commission, supra; Gelman* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9130 at 51,020 (D.C. Cir. 1980), *cert. denied*, 49 U.S.L.W. 3227 (October 6, 1980).

interpreted as restricting the intra-party financial arrangements employed in making expenditures thereunder,[22] this court has

> consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority.

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[22] The Commission might have been precluded, however, from reversing itself on a construction of § 441a(d) within the confines of an enforcement matter. Since the Commission had previously interpreted § 441a(d) as not rendering illegal NRSC agreements with state Republican Party committees for the purpose of making § 441a(d)(3) expenditures, reversal of this position and the Commission's application of this new construction to NRSC's activities in the 1980 election, could have been construed as the retroactive application of a new rule of law. This Court has consistently held that the retroactive application of new standards or rules of law should be avoided especially where the resulting inequity would be greater than the statutory purpose to be effectuated by the application. *Chevron Oil Company* v. *Huson*, 404 U.S. 97, 106-8 (1971); *Securities and Exchange Commission* v. *Cheney*, 332 U.S. 194, 203 (1947). *See also Retail Wholesale and Department Store Union* v. *National Labor Relations Board*, 426 F.2d 380 (D.C. Cir. 1972). As recognized by this Court's expedited issuance of a stay of the court of appeals' mandate, the inequity of applying the court's new construction to NRSC's activities in the 1980 election would have been exacerbated by the timing of the judgment and mandate, issued less than one month prior to November 4, 1980. *See O'Brien* v. *Brown*, 409 U.S. at 1. Moreover, FECA itself limits the Commission to initially proposing any rule of law not stated in the Act or regulations already prescribed thereunder "only as a rule or regulation pursuant to procedures established" by Congress. 2 U.S.C. §§ 437f(b), 438(d). *See* Argument B, *infra*.

Mourning v. *Family Publications Service, Inc.*, 441 U.S. at 371, *citing Northwestern Electric Co.* v. *Federal Power Commission*, 321 U.S. 119, 124 (1944); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224 (1943); *American Telephone & Telegraph Co.* v. *United States*, 299 U.S. 232, 236 (1936). Because the Commission is the expert agency established by Congress with the exclusive authority to enforce FECA, its determinations with regard to FECA's application and enforcement are entitled to great weight.[23] The Commission's judgment

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[23] The court of appeals rejected the Commission's determination stating that it found "a troubling absence of consistent reasoning" in the Commission's construction of the statute. FEC Pet. App. C at 35. To the contrary, the Commission has consistently adhered to its construction of § 441a(d)(3) as not limiting party committees in their financial arrangements. As Judge Wilkey recognized, the construction of § 441a(d)(3) was one "validated and sustained by the FEC against every challenge since 1976." FEC Pet. App. C at 58. More specifically, the Commission consistently construed § 441a(d)(3) so as not to prohibit NRSC's intra-party agency agreements in the context of three separate administrative complaints. *See* note 6, *supra*. In the General Counsel's Report to the Commission with regard to MUR 780, the General Counsel relied primarily on the absence of any specific prohibition in FECA in recommending that the Commission construe § 441a(d)(3) as not prohibiting NRSC from utilizing the challenged intra-party agency agreements. The Report also drew an analogy to the Commission's construction of § 441a(d) in a previous Advisory Opinion. AO 1976-108, note 6, *supra*. In MUR 820, the General Counsel's Report recognized the Commission's construction of the statute in MUR 780, drew the same analogy to AO 1976-108, and cited, as additional justification for the recommended statutory construction, 11 C.F.R. § 110.7. Finally, with regard to MUR 1234, challenged in the instant case, the General Counsel's Report noted that this was the third occasion on which the Commission had been asked to construe § 441a(d)(3) to prohibit NRSC's intra-party financial arrangements,

should be affirmed if it is "reasonably related to the purposes of the enabling legislation," *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 280-281 (1969) and "within the bounds of [its] administrative powers." *American Telephone & Telegraph Co.* v. *United States*, 299 U.S. at 236. *See also American Trucking Associations* v. *United States*, 344 U.S. 298 (1953). Because Congress has mandated that the Commission be accorded exclusive jurisdiction with regard to FECA's enforcement, the

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and added, as justification for the recommendation, an analysis of § 441a(d)(3) itself, a review of the provision's legislative history, and the fact that Congress had amended FECA recently with knowledge of the Commission's construction of § 441a(d)(3) and had let that construction stand. All Commission votes with regard to the construction of § 441a(d)(3) in MURs 780, 820 and 1234 were unanimous.

The per curiam opinion of the court of appeals concluded that "the Counsel's shifting positions offer no adequate support for a claim that the Commission's position here is a product of thorough consideration, careful deliberation, and secure judgment." FEC Pet. App. C at 37. The Commission disagrees that three consistent results can equal a "shifting position", and notes that at least some of the variance in cited support for the recommended statutory construction was the result of differences in the three separate administrative complaints themselves. In any event, this Court has expressly held that an agency may alter its interpretation of a statutory term in light of administrative experience. *National Muffler Dealers Assoc., Inc.* v. *United States*, 440 U.S. 472, 485 (1979); that an administrative agency is not disqualified from changing its mind, *National Labor Relations Board* v. *Local Union No. 103, International Assoc. of Bridge, Structural and Ornamental Iron Workers, AFL-CIO*, 434 U.S. 335, 351 (1978); and that the authority for an agency to modify its construction of a statute in light of cumulative experience is clear. *Beth Israel Hospital* v. *National Labor Relations Board*, 437 U.S. 483, 508 (1978).

Commission's construction of 2 U.S.C. § 441a(d)(3), "[u]nless demonstrably irrational, . . . should be dispositive." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980).[24]

B. Congress Intended that FECA's Advisory Opinion and Rulemaking Processes be Utilized for the Development of Rules of Law to Implement FECA.

In disagreeing with the Commission's interpretation in the instant action, the court of appeals rested its judgment largely on its perception that the Commission

> presented no reasoned explanation of its decision. It merely pronounced that it found 'no reason to believe' that the NRSC violated the Act in making expenditures as agents of the national and state committees.

FEC Pet. App. C at 34. The court rejected as insufficient in this instance the Commission's practice of making such a finding, closing its file on the matter, and placing the entire file, "including staff reports and

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[24] As Judge Wilkey recognized:

> The penchant of this court to give no deference whatsoever to the responsible agency's interpretation of its role and basic statute has been noted with acerbity by the Supreme Court in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978) and by commentators, *e.g.*, Scalia, *"Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court,"* 1978 S.Ct. Rev. 345, 358, 371. Deference to the Commission on new issues like this before a new agency gives the agency the chance it needs to make its own interpretation, because it has the responsibility to make its statute work. *Power Reactor* v. *Electricians*, 367 U.S. 396, 408 (1961).

FEC Pet. App. C at 47 n.6.

recommendations," in a public file. FEC Pet. App. C at 34, 32. But this is precisely what Congress has required that the Commission do when it concludes enforcement matters.[25] *See* 2 U.S.C. § 437g. The court's judgment is thus premised on a misapprehension of the statutory scheme enacted by Congress, for it is the Advisory Opinion procedures and the rulemaking procedures which are designed to meet the objections of the court of appeals.[26] Thus, Congress has authorized the Commission to "render advisory opinions," 2 U.S.C. § 437d(a)(7), and to "prescribe rules, regulations and forms to carry out the provisions" of the Act. 2 U.S.C. §§ 437d(a)(8), 438(a)(8).[27] Congress has sculpted FECA's advisory

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[25] One commentator has argued that the Commission's compliance with Congress's mandate that its enforcement matters be held confidential and made public only at the close of the investigation

> reduces the coherence and predictability of enforcement decisions and deprives political participants of a guide to the Commission's interpretation of the law.

Note, *The Federal Election Commission: The First Amendment and Due Process, supra,* note 15. However, this argument ignores the availability and wide-spread use of FECA's Advisory Opinion procedure as enacted by Congress and the option available to political participants to petition the Commission to institute a rulemaking proceeding to resolve "difficult interpretive questions." *Id.* at 1200 n.13.

[26] Rulemaking procedures have been recognized as the best method for construing a statute or establishing new standards. They are designed to fill in the interstices of a statute. *Securities and Exchange Commission* v. *Cheney,* 332 U.S. at 202 and to "promulgat[e] policy type rules or standards." *United States* v. *Florida East Coast R. Co.,* 410 U.S. 224, 245 (1973).

[27] The full text of 2 U.S.C. §§ 437d(a)(7), (8), 438(a)(8) is reprinted in the Appendix hereto.

opinion and rulemaking procedures to ensure that Commission decisions in these areas are fully supported by the Act or its legislative history and open to public comment.

Thus, FECA specifically requires that the Commission issue Advisory Opinions on the application of "any rule of law" found in FECA or in any regulation prescribed thereunder to "a specific transaction or activity."[28] 2 U.S.C. § 437f(a), (b). Moreover, FECA's Advisory Opinion procedure requires that the Commission make public all requests for advisory opinions and accept written comments on such requests. 2 U.S.C. § 437f(d). And the Government in the Sunshine Act, 5 U.S.C. § 552b, requires that Commission meetings discussing or issuing advisory opinions be public.[29]

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[28] Congress has also ensured that persons to whom advisory opinions are issued and persons involved "in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which," an advisory opinion was rendered may rely on the opinion. 2 U.S.C. § 437f(c).

[29] The Commission's advisory opinion process has been viewed as a ". . . prompt means of resolving doubts with respect to the statute's reach." *Martin Tractor Co.* v. *Federal Election Commission*, 627 F.2d 375, 384 (D.C. Cir. 1980), *cert. denied sub nom., National Chamber Alliance for Politics* v. *Federal Election Commission*, —— U.S. ——, 100 S.Ct. 360 (1980). *See Bread Political Action Committee* v. *Federal Election Commission*, 635 F.2d 621, 633 (7th Cir. 1980) (en banc), *appeal docketed* No. 80-1481 (March, 1981). Moreover, the process has been utilized successfully by political participants seeking advice concerning the application of § 441a(d) to their proposed activities. *See, e.g.*, AO 1975-2, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5108, (§ 608(f)(3), statutory predecessor to § 441a(d), does not prohibit allocation of a state's expenditure limit thereunder to a subordinate

Additionally, the Commission's rulemaking power and its power to issue regulations extends to the prescription of all "rules, regulations, and forms to carry out the provisions" of FECA. 2 U.S.C. § 438(a)(8). Congress has enacted precise procedures governing this process which require that the Commission transmit to Congress a detailed "explanation and justification" of any rule or regulation. 2 U.S.C. § 438(d)(1). Moreover, Congress has reserved to itself the power to disapprove any rule or regulation as submitted by the Commission by a vote of either House. 2 U.S.C. § 438(d)(2). And the Commission publishes in the Federal Register any notice of proposed rulemaking, soliciting public comment thereon.[30]

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party committee); AO 1975-29, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5129, (§ 441a(d) does not limit the allocation of expenditures between a State party committee and a subordinate party committee except to the extent of the aggregate limitation); AO 1976-108, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5236, (§ 441a(d) does not limit the Republican National Committee to the use of its own funds when designating NRSC as its agent for the purpose of making § 441a(d)(3) expenditures); AO 1978-50, 1 Fed. Elec. Camp. Fin Guide (CCH) ¶ 5353, (State party Committee's expenses for a get-out-the-vote drive are limited by § 441a(d)); AO 1979-9, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5400, (§ 441a(d) does not prohibit a subordinate state party committee from making "§ 441a(d)" expenditures directly to vendors); AO 1979-30, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5413, (state party committees making § 441a(d) expenditures must register with the Commission for disclosure purposes); AO 1980-119, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5561, (expenditures for television air time made by NRSC in support of a senatorial candidate are limited by § 441a(d) even though the air waves reach beyond the state to persons ineligible to vote).

[30] A provision permitting good faith reliance on a rule or regulation is found at 2 U.S.C. § 438(e).

Had DSCC been truly interested in ascertaining from the Commission whether § 441a(d)(3) would prohibit agency agreements it desired to reach with its own state Democratic Party committees, it could have requested that the Commission issue an advisory opinion on the matter. The Commission would have then been required to make such a request public, to accept public comments and to issue the opinion within a statutory time restraint, applying FECA or a Commission rule or regulation to the specific transaction suggested by DSCC. *See* 2 U.S.C. § 437f. Moreover, if DSCC were asking that the Commission reverse its prior interpretation and construction of FECA, the proper statutory procedure to be employed would have been the Commission's rulemaking procedures. *See* 2 U.S.C. § 438(d).[31]

By reversing the Commission's interpretation of 2 U.S.C. § 441a(d)(3), an interpretation applied in the context of an enforcement matter, supported by statutory language and legislative history and, by way of analogy, by a Commission regulation and an advisory opinion, the court of appeals has disregarded congressional intent. Such a reversal must be con-

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[31] DSCC is familiar with the procedure for petitioning the Commission to institute rulemaking, 5 U.S.C. § 553(e), having been a party to the first and only such petition filed thus far with the Commission. In response to the petition filed by DSCC and DNC on April 3, 1980, the Commission adopted a procedure requiring publication of the petition and acceptance of written public comments thereon. Although the Commission declined to institute the rulemaking suggested by DSCC, deeming the requested rule outside its jurisdiction, the publication of the request elicited written comments from interested members of the public, and the Commission's consideration of the matter was conducted at a meeting open to the public.

sidered a new rule of law and Congress has specifically limited the Commission to prescribing rules, regulations or forms only within the procedures enacted at 2 U.S.C. § 438(d). Thus, Congress has reserved to itself the final disapproval of Commission regulations, and has required that proposed Commission regulations be transmitted to Congress accompanied by a detailed explanation and justification.[32] The court of appeals has unnecessarily intruded itself into this procedure, ignoring Congress's final disapproval authority. To the extent that the judgment of the court of appeals requiring that the Commission conform with its construction of § 441a(d)(3) is a requirement that the Commission prescribe a new rule or regulation outside the statutory frame-

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[32] The Commission has been criticized before Congress for developing rules on an entirely *ad hoc* basis in the course of its enforcement (or compliance) activities, with the result that candidates and committees are held liable for violating

> rules which have been developed entirely after the fact. . . . Under this practice, when a fact pattern comes before the Commission—either through a third party complaint or in the course of its supervisory activities—it will develop a sense or impression, that certain conduct constitutes a violation of the Act and that initiation of a compliance proceeding is appropriate. In the course of this proceeding, the Office of General Counsel will articulate—and the Commission may well adopt—a "rule of law" (which I advisedly place in quotation marks) which is nowhere found in the Campaign Act, the Regulations, Commission Advisory Opinions, or policy statements, and which raises important policy questions.

Testimony of Robert F. Bauer, Esquire—Before the Committee on House Administration, Task Force on Enforcement, June 18, 1980.

work, the court has disregarded Congressional intent. *See* 2 U.S.C. § 437f(b). Not only should the court have deferred to the Commission's expert construction of § 441a(d)(3), but to the extent that the court deemed such a construction inadequately supported by the statute, the court was required to refer DSCC to FECA's advisory opinion or rulemaking procedures.[33] Making its own new rule disregards Congressional intent.

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[33] DSCC itself now seems to recognize the perils of seeking agency rulemaking in the context of administrative enforcement proceedings, having requested that this Court "vacate the Judgment of the Court of Appeals and instruct the District Court to dismiss the action." Respondent's Brief in Opposition at 8 (Feb. 6, 1981). DSCC argued that this Court should deny the Commission's petition for a writ of certiorari because "[w]ith the passing of the Congressional elections of 1980, this case has been mooted," Respondent's Brief in Opposition at 7, and, that since its complaint to the Commission was acted upon and reviewed by the district court and the court of appeals in less than 5 months, another such sequence of events, including review by this Court, could occur prior to the next election. *Id.* at 9. However, as this Court recently recognized in another election-related case:

> [t]his case is not moot. . . . The effect of the . . . [court of appeals' judgment and mandate] remains and controls future elections. *Moore* v. *Ogilvie*, 394 U.S. 814, 816, 89 S.Ct. 1493 1494, 23 L.Ed.2d 1. In any event, even if the order were clearly limited to the 1980 election year, the controversy would be properly before us as one "capable of repetition, yet evading review." *Rosario* v. *Rockefeller*, 410 U.S. 752, 756, n.5, 93 S.Ct. 1245, 1249, n.5, 36 L.Ed.2d 1; *Dunn* v. *Blumstein*, 405 U.S. 330, 333 n.2, 92 S.Ct. 995, 998, n.2; 31 L.Ed.2d 274.

Democratic Party of the United States v. *LaFollette*, —— U.S. ——, 101 S.Ct. 1010, 1015 n.13 (1981).

II. THE FEDERAL ELECTION COMMISSION'S INTERPRETATION OF 2 U.S.C. § 441a(d) AS NOT PROHIBITING INTRA-PARTY AGREEMENTS IS NOT CONTRARY TO LAW.

The question presented to the Commission in DSCC's administrative complaint was whether one party committee (a state committee) violated 2 U.S.C. § 441a(d) by designating another party committee (a national committee) for purposes of expenditure limitations contained in § 441a(d)(3). The Commission's interpretation is not contrary to law because the interpretation has a rational basis in the language of the statute itself, in the Commission's regulations and advisory opinions and in the legislative history.

The statutory language, standing alone, does not prohibit the intra-party agreement in question as DSCC argues. Rather, the statute establishes separate expenditure limitations for presidential and congressional elections with respect to national party committees. State party committees are provided expenditure limitations only with regard to House and Senate elections. Thus, "[n]ot withstanding any other provision of law with respect to limitations on expenditures or limitations on contributions," 2 U.S.C. § 441a(d)(1), the statute in question limits to specific amounts the party expenditures, as relevant here, in senatorial elections.[34]

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[34] The Commission's regulations clarify that the limitations of § 441a(d)(3) are separate and distinct for national committees and state committees, 11 C.F.R. § 110.7(b)(1); that neither the national party committees nor state party committees may make independent expenditures in connection with the general election campaigns of their party's federal candidates, 11 C.F.R. § 110.7(a)(5), (b)(4); and

DSCC, however, argues that the language of the statute precludes the intra-party agency agreements at issue. And the court below concluded that because NRSC was not specifically identified in the section [86]

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that the State party central committees will be held responsible for "insuring that the expenditures of the entire party organization are within the limitations." 11 C.F.R. § 110.7(c).

[86] Both the RNC and the DNC have established several political committees which expend funds and/or receive contributions for purposes of influencing federal elections. The Commission's public records disclose that the following committees registered as national Republican Party committees: College Republican National Committee, National Black Republican Council, National Republican Heritage Groups (Nationalities) Council, Republican National Committee—Contributions, Republican National Committee—Expenditures, Republican National Hispanic Assembly, Young Republican National Federation, National Republican Senatorial Committee—Contributions, National Republican Senatorial Committee—Expenditures, National Republican Congressional Committee—Contributions, National Republican Congressional Committee—Expenditures, 1979 Republican Senate—House Dinner, 1980, Republican Senate—House Dinner.

And the following are registered as national Democratic Party committees: Democratic National Committee—Travel Escrow Account, Democrats Abroad—Belgium, Democrats Abroad—France, Democrats Abroad—United Kingdom, DNC Services Corporation/Democratic National Committee, Democratic Senatorial Campaign Committee, Democratic Congressional Campaign Committee, Democratic Congressional Dinner Committee, Democratic House and Senate Council, Association of State Democratic Chairpersons. The court below concluded, however, that "NRSC is neither the 'national' nor a 'State' committee of the Republican Party within the contemplation of Section 441a(d)(3)," apparently relying upon the definitions contained in § 431(14), (15). FEC Pet. App. C at 38-9. This conclusion erroneously assumes that a national political party may have only one political committee and that FECA may prevent the parties from organizing themselves in a manner of their own choosing.

and because the statute does not specifically allow the intra-party agency agreements in question, the statute "seems to preclude" the agreement. FEC Pet. App. C at 39.

All parties to this litigation and the court below necessarily agree, however, that § 441a(d) does not make any reference at all to such intra-party agreements. Indeed the court of appeals could do no more than suggest that had Congress intended to allow such intra-party agreements "it is not unreasonable to think that Congress would have said so explicitly. . . ." FEC Pet. App. C at 41.[36] Thus, the language of § 441a(d) does not prohibit such agreements.

Additionally, by regulation, the Commission has construed § 441a(d)(2) as not prohibiting agency agreements. Thus, the national party committees may make expenditures "through *any* designated agent, including State and subordinate party committees." 11 C.F.R. § 110.7(a)(4) (emphasis added). This regulation, having been promulgated pursuant to the congressional review procedure outlined in § 438(d), presents affirmative evidence that Congress did not intend the language of § 441a(d) to prohibit agency

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[36] This Court has concluded that "absent a clear expression, it becomes necessary to consider the implicit character of the statutory scheme . . . and it is appropriate to defer to the [agency] in determining what resolution of that issue is implied. . . ." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. at 560. *See also Citizens and Southern National Bank* v. *Bougas*, 434 U.S. 35 (1977) ("[o]ur experience with the inexactitude of congressional language, an inexactitude that perhaps often is inevitable . . . [citing *Buckley* v. *Valeo*, *supra*] does not convince us that much weight can be attached to the use of "any" and "the" respectively . . ."). *Id.* at 45. *See* note 34, *supra*; FEC Pet. App. C at 43 n.34.

agreements between national parties and *any* chosen entity or person in presidential elections.[37] The language of § 441a(d)(2) and § 441a(d)(3) is, of course, similar in all respects relevant herein. Thus, it is not irrational to conclude, as did the Commission, that the language of § 441a(d)(3), like the language of § 441a(d)(2), does not prohibit intra-party agency agreements.

Not only does the statutory language not prohibit intra-party agreements but an interpretation of § 441a(d) which would prohibit such agreements would conflict with the intent of Congress.[38] Apply-

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[37] 11 C.F.R. § 110.7 and the "Explanation and Justification" required by Congress to be submitted pursuant to § 438(d) are attached hereto in the Appendix. The "Explanation and Justification" states that 11 C.F.R. § 110.7 follows the statutory provisions in 2 U.S.C. § 441a(d). Thus, as early as April, 1977, the Commission notified Congress of its interpretation of § 441a(d) as not precluding intra-party agreements. *See* H. Doc. No. 95-44 at 70, 95th Cong., 1st Sess. (1977).

[38] The court below seems to have been concerned that the Commission's interpretation of § 441a(d)(3) would increase the expenditure limitations enacted by Congress. *See* FEC Pet. App. C at 29. However, the court misinterpreted the effect of the Commission's construction of the statute since no more money may be spent under the Commission's interpretation of § 441a(d)(3) than under the court's. Under the appellate court's construction of 2 U.S.C. § 441a(d)(3), a violation of FECA would not occur if a national committee of a political party transfers monies to be spent by a state committee of that political party pursuant to 2 U.S.C. § 441a(d)(3). *See* 2 U.S.C. § 441a(a)(4), Appendix. However, if the state committee requests that the national committee spend those same monies on its behalf, FECA has been violated. This would not appear to be the only reasonable interpretation of the provision at issue. *See* FEC Pet. App. C at 53; *Buckley* v. *Valeo*, 424 U.S. at 57.

ing elementary rules of statutory construction, FECA must be read as a whole in order to ascertain its true meaning, and each section must be construed in conjunction with every other section to produce a harmonious whole. *See National Labor Relations Board* v. *Lion Oil Co.*, 352 U.S. 282, 288 (1957); *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 285 (1956); *Johnson* v. *Seaboard Air Line Railroad Co.*, 405 F.2d 645, 654 (4th Cir. 1968), *cert. denied* 394 U.S. 918 (1969). Legislative enactments must be given a sensible and reasonable construction effectuating their purposes. *Schmiedigen* v. *Celebrezze*, 245 F. Supp. 825, 827 (D.D.C. 1965). In discerning legislative intent, courts must project as well as they can how the legislature would have dealt with a concrete situation if it had spoken. *See District of Columbia* v. *Orleans*, 406 F.2d 957, 958 (D.C. Cir. 1968), *quoting City of Chicago* v. *Federal Power Commission*, 385 F.2d 629, 635 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 945 (1968).

In 1976, when Congress reconstituted the Commission and amended FECA following this Court's *Buckley* v. *Valeo* decision, Congress clearly endeavored to encourage the close relationship within the political party structure and among various political party committees.[39] Thus, Congress provided that the lim-

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[39] The court below attempted to draw a distinction between what it thought were "political parties, whose role in the political process Congress ought to strengthen," FEC Pet. App. C at 42, and congressional campaign committees. To support this distinction, the court relied upon one Senator's 1974 statement suggesting that national political parties are supported by thousands of people giving $5 and $10 amounts and insinuating that congressional campaign committees are

itations on contributions were not to apply to "transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party." 2 U.S.C. § 441a(a)(4). *See also* 2 U.S.C. § 441a(a)(5)(B). Because transfers of funds between the political committees of a party are free from any contribution limitations and are permitted without limit, it is clear that Congress perceived the various committees within the parties to be closely connected units and wished to encourage their working toward a common purpose.

Thus, because NRSC is a party committee,[40] it may freely transfer any or all of its funds to the state committees of the Republican Party if it so desires, and *vice versa*. That is, rather than a state party committee authorizing NRSC to spend those specific amounts, NRSC could transfer the amounts to the state party's account. As Judge Wilkey noted:

> The difference is purely one of form, not substance. It makes absolutely no difference in the scheme of control of campaign expenditures and contributions whether the [NRSC] in Wash-

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supported only by large donors. *Id* . There is no basis in the present record to support this contention. The Commission's public disclosure records indicate that during 1980, 60% of contributions received by RNC were in amounts less than $200 in the aggregate while 82% of NRCC's contributions were in these amounts and 53% of NRSC's contributions were in this category. Moreover, the per curiam court itself, by acknowledging that the congressional campaign committees may not make independent expenditures, FEC Pet. App. C at 39 n.28, recognized that these committees are party committees. *But, cf., Id.* at 44 n.35.

[40] *See* FEC Pet. App. C at 59 n.16. *Cf. Id.* at 44 n.35.

> ington writes a check and mails it to the state committee in Louisville, Kentucky, to be expended for the benefit of the Republican nominee for the Senate in the State of Kentucky, or on the other hand, as is now the practice, the state committee in Louisville, Kentucky, writes a letter to the Senatorial Campaign Committee in Washington authorizing that committee to make expenditures on behalf of the same Republican nominee for the Senate in Kentucky.

FEC Pet. App. C at 53.[41]

Finally legislative history supports the Commission's interpretation of § 441a(d). In 1978, a bill to amend FECA was proposed and, after consideration, reported out of the Committee on House Administration. H.R. 11315, 95th Cong. 1st Sess. (1978), H.R. Rep. No. 95-982, 95th Cong. 2d Sess. (1978). The legislative proposal contained language in § 113 which would have prohibited any "movement of funds" between "the political committees of a national political party (including House and Senate congressional campaign committees of such party) and the political committees of a State political party (including district, local, or subordinate committees of such party) for the purpose of making contributions to, or expenditures on behalf of

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[41] It would appear that the majority opinion was premised upon a policy determination that the court's interpretation would establish a better working relationship between candidates and state parties through § 441a(d) expenditures. *See* FEC Pet. App. C at 44. However, there is absolutely no evidence that Congress intended to affect the candidate-State party relationship via § 441a(d) or § 441a(a)(4). Section 441a(a)(4), however, is strong evidence that Congress was interested in encouraging vital interrelationships between all levels of the political party structure.

any candidate for Federal office." Thus, § 113 of H.R. 11315 was premised upon an interpretation of FECA that party funds could be transferred for the purpose of the transferee committee making contributions or expenditures. The House, however, rejected the rule for consideration of the bill. *See* 124 Cong. Rec. H2261-69 (daily ed. Mar. 21, 1978).[42]

By considering an amendment to FECA which would have the effect of limiting the ability of NRSC to transfer funds to state committees to enable the state committees to make § 441a(d) expenditures, the House recognized that FECA as it now stands does not limit such transfers. By not adopting the proposed amendment, the House left the decision as to the proper mechanism for § 441a(d) expenditures to the political parties themselves.[43] Thus, party committees at the national and state level may work in

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[42] Several members voiced objection to prohibiting transfers between the party committees. For example, Representative Quillen remarked:

> [W]hy reduce the ability of the political parties to support its [sic] candidates? How can the Republican Party unduly influence a Republican candidate? How can the Democratic party unduly influence a Democratic candidate? On what basis should the ability of the two political parties to support their candidates be prevented? And what is improper about a national party committee transferring funds to a State committee for use in Federal campaigns? This bill will prevent that, too.

124 Cong. Rec. H2261 (daily ed. Mar. 21, 1978) (remarks of Rep. Quillen).

[43] Reenactment of a statute without change in its language indicates approval of interpretations rendered prior to the reenactment. *National Labor Relations Board* v. *Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 351 (1953); *Helvering* v. *Griffiths*, 318 U.S. 371, 395 (1943).

tandem with regard to financing § 441a(d) expenditures if they desire to do so. Clearly, the goal of coordinated party expenditures may be achieved if the state committees designate NRSC to carry out § 441a(d)(3) expenditures just as well as if the national committee were to designate the state committees to carry out § 441a(d)(2) expenditures.

In addition to the rejection of H.R. 11315, the 1980 FECA Amendments[44] contain a number of examples of congressional interest in encouraging state and local party participation in candidate campaigns, rather than focusing upon intra-party relationships. For example in 2 U.S.C. § 431(8)(B)(x), (xi), (xii) Congress exempted certain grass roots activity from the definition of contribution, but provided the exemptions only if the "payments are made from contributions. . . ." Thus, 11 C.F.R. § 100.7(b)(15)(vii) states that "materials purchased with funds donated by the national committee to such State or local committee for the purchase of such materials, shall not qualify under this exemption." Where Congress specifically intended to limit state party committees to the use of funds contributed to them, it so provided. *See* 2 U.S.C. §§ 431(8)(B)(x)(2), 431(8)(B)(xii)(2). Section 441a(d) contains no similar limitation.

In sum, the Commission submits that its interpretation of 2 U.S.C. § 441a(d) is clearly not irrational. The statutory language does not prohibit such intra-party financial arrangements and the Commission's regulations and the legislative history of FECA support the Commission's interpretation. The Commission's decision to dismiss DSCC's complaint, constru-

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[44] *See* note 4, *supra*.

ing § 441a(d)(3) so as not to preclude the intra-party agency agreements challenged therein was consistent with the intent of Congress and requires affirmance by this Court.

CONCLUSION

For reasons set forth herein, this Court should reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APRIL 16, 1981

APPENDIX

2 U.S.C. § 437d. Powers of the Commission

(a) *Specific authorities.* The Commission has the power— . . .

(6) to initiate (through civil actions for injunctive, declaratory, or other appropriate relief), defend (in the case of any civil action brought under section 437g(a)(8) of this title) or appeal any civil action in the name of the Commission to enforce the provisions of this Act and chapter 95 and chapter 96 of title 26, through its general counsel;

(7) to render advisory opinions under section 437f of this title;

(8) to develop such prescribed forms and to make, amend, and repeal such rules, pursuant to the provisions of chapter 5 of title 5, United States Code, as are necessary to carry out the provisions of this Act and chapter 95 and chapter 96 of title 26; and

(9) to conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities.

2 U.S.C. § 437f. Advisory opinions

(a) *Requests by persons, candidates, or authorized committees; subject matter; time for response.*

(1) Not later than 60 days after the Commission receives from a person a complete written request concerning the application of this Act, chapter 95 or chapter 96 of title 26, or a rule or regulation prescribed by the Commission, with

respect to a specific transaction or activity by the person, the Commission shall render a written advisory opinion relating to such transaction or activity to the person.

(2) If an advisory opinion is requested by a candidate, or any authorized committee of such candidate, during the 60-day period before any election for Federal office involving the requesting party, the Commission shall render a written advisory opinion relating to such request no later than 20 days after the Commission receives a complete written request.

(b) *Procedures applicable to initial proposal of rules or regulations, and advisory opinions.* Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title. No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section.

(c) *Persons entitled to rely upon opinions; scope of protection for good faith reliance.*

(1) Any advisory opinion rendered by the Commission under subsection (a) of this section may be relied upon by—

(A) any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered; and

(B) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.

(2) Notwithstanding any other provisions of law, any person who relies upon any provision or finding of an advisory opinion in accordance with the provisions of paragraph (1) and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Act or by chapter 95 or chapter 96 of title 26.

(d) *Requests made public; submission of written comments by interested public.* The Commission shall make public any request made under subsection (a) of this section for an advisory opinion. Before rendering an advisory opinion, the Commission shall accept written comments submitted by any interested party within the 10-day period following the date the request is made public.

2 U.S.C. § 437g. Enforcement

(a) *Administrative and judicial practice and procedure.*

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of title 18, United States Code. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commis-

sion conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days

of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4) (A) (i) Except as provided in clause (ii), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of title 26, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6) (A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately

preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(B) (i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of title 26, the Commission shall make public such determination.

(5) (A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violations of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6) (A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of title 26, by the methods specified in paragraph (4)(A), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expediture involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of title 26.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the per-

son involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26, the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(7) In any action brought under paragraph (5) or (6), subpoenas for witnesses who are required to attend a United States district court may run into any other district.

(8) (A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period begining on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(10) Any action brought under this subsection shall be advanced on the docket of the court in which filed, and put ahead of all other actions (other than other actions brought under this subsection or under section 437h of this title).

(11) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(12)(A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who

knowingly and willfully violates the provisions of subparagraph (A) shall be fined not more than $5,000.

(b) *Notice to persons not filing reports prior to institution of enforcement action; publication of identity of persons and unfiled reports.* Before taking any action under subsection (a) of this section against any person who has failed to file a report required under section 434(a)(2)(A)(iii) of this title for the calendar quarter immediately preceding the election involved, or in accordance with section 434(a)(2)(A)(i), the Commission shall notify the person of such failure to file the required reports. If a satisfactory response is not received within 4 business days after the date of notification, the Commission shall, pursuant to section 438(a)(7) of this title, publish before the election the name of the person and the report or reports such person has failed to file.

(c) *Reports by Attorney General of apparent violations.* Whenever the Commission refers an apparent violation to the Attorney General, the Attorney General shall report to the Commission any action taken by the Attorney General regarding the apparent violation. Each report shall be transmitted within 60 days after the date the Commission refers an apparent violation, and every 30 days thereafter until the final disposition of the apparent violation.

(d) *Penalties; defenses; mitigation of offenses.*

(1) (A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution or expenditure aggregating $2,000 or

more during a calendar year shall be fined, or imprisoned for not more than one year, or both. The amount of this fine shall not exceed the greater of $25,000 or 300 percent of any contribution or expenditure involved in such violation.

(B) In the case of a knowing and willful violation of section 441b(b)(3), the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar year. Such violation of section 441b(b)(3) may incorporate a violation of section 441c(b), 441f or 441g of this title.

(C) In the case of a knowing and willful violation of section 441h of this title, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission under subsection (a)(4)(A) which specifically deals with the act or failure to act constituting such violation and which is still in effect.

(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, the court before which such action is brought shall take into ac-

count, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether—

(A) the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);

(B) the conciliation agreement is in effect; and

(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.

2 U.S.C. § 438. Administrative provisions

(a) *Duties of Commission.* The Commission shall— . . .

(8) prescribe rules, regulations, and forms to carry out the provisions of this Act, in accordance with the provisions of subsection (d) of this section . . .

(d) *Rules, regulations, or forms; issuance, procedures applicable, etc.*

(1) Before prescribing any rule, regulation, or form under this section or any other provision of this Act, the Commission shall transmit a statement with respect to such rule, regulation, or form to the Senate and the House of Representatives, in accordance with this subsection. Such statement shall set forth the proposed rule, regulation, or form, and shall contain a detailed explanation and justification of it.

(2) If either House of the Congress does not disapprove by resolution any proposed rule or regulation submitted by the Commission under this section within 30 legislative days after the date of the receipt of such proposed rule or regulation or within 10 legislative days after the date of receipt of such proposed form, the Commission may prescribe such rule, regulation, or form.

(3) For purposes of this subsection, the term "legislative day" means, with respect to statements transmitted to the Senate, any calendar day on which the Senate is in session, and with respect to statements transmitted to the House of Representatives, any calendar day on which the House of Representatives is in session.

(4) For purposes of this subsection, the terms "rule" and "regulation" mean a provision or series of interrelated provisions stating a single, separable rule of law.

(5) (A) A motion to discharge a committee of the Senate from the consideration of a resolution relating to any such rule, regultion, or form or a motion to proceed to the consideration of such a resolution, is highly privileged and shall be decided without debate.

(B) Whenever a commitee of the House of Representatives reports any resolution relating to any such form, rule or regulation, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and

is not debatable. An amendment to the motion is not in order, and is not in order to move to reconsider the vote by which the motion is agreed to or disagreed with.

(e) *Scope of protection for good faith reliance upon rules or regulations.* Notwithstanding any other provision of law, any person who relies upon any rule or regulation prescribed by the Commission in accordance with the provisions of this section and who acts in good faith in accordance with such rule or regulation shall not, as a result of such act, be subject to any sanction provided by this Act or by chapter 95 or chapter 96 of title 26.

2 U.S.C. § 441a. Limitations on contributions and expenditures

(a) *Dollar limits on contributions.*

(1) No person shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $20,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(2) No multicandidate political committee shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(3) No individual shall make contributions aggregating more than $25,000 in any calendar year. For purposes of this paragraph, any contribution made to a candidate in a year other than the calendar year in which the election is held with respect to which such contribution is made, is considered to be made during the calendar year in which such election is held.

(4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party. For purposes of paragraph (2), the term "multicandidate political committee" means a political committee which has been registered under section 433 of this title for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

(5) For purposes of the limitations provided by paragraph (1) and paragraph (2), all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation, labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee, except that—

(A) nothing in this sentence shall limit transfers between political committees of funds raised through joint fundraising efforts;

(B) for purposes of the limitations provided by paragraph (1) and paragraph (2) all contributions made by a single political committee established or financed or maintained or controlled by a national committee of a political party and by a single political committee established or financed or maintained or controlled by the State committee of a political party shall not be considered to have been made by a single political committee; and

(C) nothing in this section shall limit the transfer of funds between the principal campaign committee of a candidate seeking nomination or election to a Federal office and the principal campaign committee of that candidate for nomination or election to another Federal office if—

(i) such transfer is not made when the candidate is actively seeking nomination or election to both such offices;

(ii) the limitations contained in this Act on contributions by persons are not exceeded by such transfer; and

(iii) the candidate has not elected to receive any funds under chapter 95 or chapter 96 of title 26.

In any case in which a corporation and any of its subsidiaries, branches, divisions, departments, or local units, or a labor organization and any of its subsidiaries, branches, divisions, departments, or local units establish or finance or maintain or control more than one separate segregated fund, all such separate segregated funds shall be treated as a single separate segregated fund for purposes of the limitations provided by paragraph (1) and paragraph (2).

(6) The limitations on contributions to a candidate imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

(7) For purposes of this subsection—

(A) contributions to a named candidate made to any political committee authorized by such candidate to accept contributions on his behalf shall be considered to be contributions made to such candidate;

(B) (i) expenditures made by any person in cooperation, consultation, or concert, with, or at the request or sug-

gestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate;

(ii) the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be a contribution to such candidate;

(C) contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the candidate of such party for election to the office of President of the United States.

(8) For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

(b) *Dollar limits on expenditures by candidates for office of President of the United States.*

(1) No candidate for the office of President of the United States who is eligible under section 9003 of title 26 (relating to condition for eligibility for payments) or under section 9033 of title 26 (relating to eligibility for payments) to receive payments from the Secretary of the Treasury may make expenditures in excess of—

(A) $10,000,000 in the case of a campaign for nomination for election to such office, except the aggregate of expenditures under this subparagraph in any one State shall not exceed the greater of 16 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section), or $200,000; or

(B) $20,000,000 in the case of a campaign for election to such office.

(2) For purposes of this subsection—

(A) expenditures made by or on behalf of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be expenditures made by or on behalf of the candidate of such party for election to the office of President of the United States; and

(B) an expenditure is made on behalf of a candidate, including a vice presidential candidate, if it is made by—

(i) an authorized committee or any other agent of the candidate for pur-

poses of making any expenditure; or

(ii) any person authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate, to make the expenditure.

(c) *Increases on limits based on increases in price index.*

(1) At the beginning of each calendar year (commencing in 1976), as there become available necessary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Commission and publish in the Federal Register the percent difference between the price index for the 12 months preceding the beginning of such calendar year and the price index for the base period. Each limitation established by subsection (b) of this section and subsection (d) of this section shall be increased by such percent difference. Each amount so increased shall be the amount in effect for such calendar year.

(2) For purposes of paragraph (1)—

(A) the term "price index" means the average over a calendar year of the Consumer Price Index (all items—United States city average) published monthly by the Bureau of Labor Statistics; and

(B) the term "base period" means the calendar year of 1974.

(d) *Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office.*

(1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.

(2) The national committee of a political party may not make any expenditure in connection with the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (e) of this section). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner of any other State, $10,000.

(e) *Certification and publication of estimated voting age population.* During the first week of January 1975, and every subsequent year, the Secretary of Commerce shall certify to the Commission and publish in the Federal Register an estimate of the voting age population of the United States, of each State, and of each congressional district as of the first day of July next preceding the date of certification. The term "voting age population" means resident population, 18 years of age or older.

(f) *Prohibited contributions and expenditures.* No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of this section. No officer or employee of a political committee shall knowingly accept a contribution made for the benefit or use of a candidate, or knowingly make any expenditure on behalf of a candidate, in violation of any limitation imposed on contributions and expenditures under this section.

(g) *Attribution of multi-state expenditures to candidate's expenditure limitation in each State.* The Commission shall prescribe rules under which any expenditure by a candidate for presidential nominations for use in 2 or more States shall be attributed to such candidate's expenditure limitation in each

such State, based on the voting age population in such State which can reasonably be expected to be influenced by such expenditure.

(h) *Senatorial candidates.* Notwithstanding any other provision of this Act, amounts totaling not more than $17,500 may be contributed to a candidate for nomination for election, or for election, to the United States Senate during the year in which an election is held in which he is such a candidate, by the Republican or Democratic Senatorial Campaign Committee, or the national committee of a political party, or any combination of such committees.

11 C.F.R. § 110.7

§ 110.7 Party committee expenditure limitations (2 U.S.C. 441a(d)).

(a)(1) The national committee of a political party may make expenditures in connection with the general election campaign of any candidate for President of the United States affiliated with the party.

(2) The expenditures shall not exceed an amount equal to 2 cents multiplied by the voting age population of the United States.

(3) Any expenditure under this paragraph (a) shall be in addition to—

(i) Any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for President of the United States; and

(ii) Any contribution by the national committee to the candidate permissible under §§ 110.1 or 110.2.

(4) The national committee of a political party may make expenditures authorized by this section through any designated agent, including State and subordinate party committees.

(5) The national committee of a political party may not make independent expenditures (see Part 109) in connection with the general election campaign of a candidate for President of the United States.

(b)(1) The national committee of a political party, and a State committee of a political party, including any subordinate committee of a State committee, may each make expenditures in connection with the general election campaign of a candidate for Federal office in that State who is affiliated with the party.

(2) The expenditures shall not exceed—

(i) In the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(A) Two cents multiplied by the voting age population of the State; or

(B) Twenty thousand dollars; and

(ii) In the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

(3) Any expenditure under paragraph (b) shall be in addition to any contribution by a committee to the candidate permissible under §§ 110.1 or 110.2.

(4) The party committees identified in (b)(1) shall not make independent expenditures in connection with the general election campaign of candidates for Federal office.

(c) For limitation purposes, State committee includes subordinate State committees. State committees and subordinate State committees combined shall not exceed the limits in paragraph (b)(2) of this section. To ensure compliance with the limitations,

the State committee shall administer the limitation in one of the following ways:

(1) The State central committee shall be responsible for insuring that the expenditures of the entire party organization are within the limitations, including receiving reports from any subordinate committee making expenditures under paragraph (b) of this section, and filing consolidated reports showing all expenditures in the State with the Commission; or

(2) Any other method, submitted in advance and approved by the Commission which permits control over expenditures.

EXPLANATION AND JUSTIFICATION OF REGULATIONS

April 13, 1977

11 C.F.R. § 110.7

Party Expenditures

This section follows the statutory provisions in 2 U.S.C. § 441a(d) for the national committee and the State and subordinate State committees of a political party to make coordinated expenditures in the general election on behalf of Presidential, Senate and House candidates. It further provides that the committees may not make independent expenditures on behalf of candidates on whose behalf the statute explicitly permits them to make coordinated expenditures. The section provides sugggested schemes for a State and subordinate State committees to coordinate their expenditures on behalf of candidates. It further provides that subordinate State party committees may make coordinated or uncoordinated expenditures of up to $1,000 on behalf of the party's Presidential ticket. These expenditures are reported to the Presidential candidate's principal campaign committee but do not count against any spending limitations. This provision is derived from 26 U.S.C. § 9012(f).

Explanation and Justification of Regulations Concerning January 8, 1980 Amendments to Federal Election Campaign Act of 1971.

§ 110.7 Party Committee Expenditure Limitations

This section follows current regulation 11 CFR 110.7, except that the provisions regarding limitations and allocations of expenditures by State and local party committees (110.7(b)(5) and 110.7(c)(2)(i)-(iii)) are deleted.

[SEAL] FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

September 24, 1980

George A. Fisher, Clerk
United States Court of Appeals
for the District of Columbia
United States Courthouse
3rd and Constitution Avenue, N.W.
Washington, D.C. 20001

Re: *Democratic Senatorial Campaign Committee v. Federal Election Commission*, No. 80-2074

Dear Mr. Fisher:

During oral argument on September 23, 1980, in the above captioned case, counsel for appellee Federal Election Commission was asked for a citation to legislative history supporting the fact that a national committee of a political party could utilize a national senatorial campaign committee to make expenditures under 2 U.S.C. § 441a(d).

Counsel for the Commission have been unable to discover any language in the legislative history of § 441a(d) *per se* which would indicate that Congress meant to include national senatorial campaign committees as a national committee of a political party under § 441a(d). *See* 2 U.S.C. § 431(14) (definition of "national committee").

However, the Commission submits for the court's information the following excerpts from legislative history of the 1974 and 1976 FECA Amendments which indicate Congress's impression of the role of national senatorial campaign committees within the political party structure:

> Mr. BAKER: I think that the party system in the United States is a blessing in many re-

> spects. and one of its great blessings is that it is so loosely knit that it is not inflexible, but it is strong enough and identifiable enough so that we know, for instance, that the Democratic National Committee, the Democratic Central Campaign Committee and the Democratic Congressional Committees are in fact a part of the Democratic Party.
>
> No one doubts that I think they add strenth [sic] to the party system, and I have a great deal of respect for the two-party system, and believe this amendment will strengthen it rather than diminish it.

119 Cong. Rec. S5194 (daily ed. April 3, 1974) (remarks of Sen. Baker) (discussion of an amendment which would have limited contributions to monies received from individuals).

> The conferees also determined that it is appropriate to set a higher limit on contributions from persons to political committees of national political parties in order to allow the political parties to fulfill thei unique role in the political process. In this connection, the term "political committee established or maintained by a national political party" includes the Senate and House Campaign Committees.

H.R. Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. 58 (1976) (discussion of 2 U.S.C. §§ 441a(a)(1)(B), 441a(a)(2)(B)).

The Commission regrets any inconvenience to the court resulting from this delay.

Sincerely,

/s/ Kathleen Imig Perkins
KATHLEEN IMIG PERKINS
Assistant General Counsel

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
Washington, D.C. 20001

GEORGE A. FISHER
Clerk

October 1, 1980

Charles N. Steele, Esquire
Office of the General Counsel
Federal Election Commission
1325 K Street, NW
Washington, D.C. 20463

RE: Appeal No. 80-2074, *Democratic Senatorial Campaign Committee* v.
Federal Election Commission

Dear Mr. Steele,

Confirming our telephone conversation this morning, the Court has requested that it be furnished copies of the following Commission decisions:

MUR 780 (January 19, 1979)

MUR 820 (June 19, 1979)

Both decisions were cited in your brief filed in the above referenced case. The Court would like to see the decision or order filed by the FEC in those cases as well as any supporting documents (such as a General Counsel's report) on which the Commission relied. In the event that the Commission merely effected the recommendation of the General Counsel without the issuance of a formal order, please give us a statement to that affect in your cover letter.

Please furnish these requested materials at the earliest possible time.

Very truly yours,

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

GAF:dn
cc: William E. McDaniels, Esquire
James F. Schoener, Esquire

[SEAL] FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

October 2, 1980

United States Court of Appeals
for the District of Columbia Circuit
United States Courthouse
3rd and Constitution Avenue, N.W.
Room 5413
Washington, D.C. 20001

Re: *Democratic Senatorial Campaign Committee* v. *Federal Election Commission*, No. 80-2074

Attention: George A. Fisher, Clerk

Dear Mr. Fisher:

In accordance with the request of the Clerk of the Court, the Commission submits additional materials in connection with the above-captioned case, as follows:

(1) Certification dated January 19, 1979, of final Commission action adopting recommendations as set forth in the General Counsel's Report dated December 18, 1978.

(2) Final General Counsel's Report dated December 18, 1978, with regard to MUR 780 with attachments.

(3) Certification dated June 15, 1979, of final Commission action with regard to MUR 820, approving a recommendation as set forth in the General Counsel's Report dated June 13, 1979.

(4) Final General Counsel's Report dated June 13, 1979, with regard to MUR 820 with attachments.

Where the Commission adopts the recommendation of the Office of General Counsel as stated in the General Counsel's Report, the Report serves as a statement of reasons for the Commission's action.

Sincerely,

/s/ Charles N. Steele
CHARLES N. STEELE
General Counsel

cc: Robert F. Bauer
William E. McDaniels
James F. Schoener

[Enclosures have been
deleted for purposes of this brief]

[SEAL] FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

October 7, 1980

Ms. Christine Kohl
Chief Staff Counsel
United States Court of Appeals
for the District of Columbia Circuit
3rd and Constitution Avenue, N.W.
Room 6321
Washington, D.C. 20001

Re: *Democratic Senatorial Campaign Committee* v. *Federal Eelection Commission*, No. 80-2074

Dear Ms. Kohl:

As per your telephone conversation of October 6, 1980, with Ms. Kathleen Imig Perkins of my staff, I am submitting the following Commission documents in response to the court's inquiry as to whether the DSCC has acted as an agent on the national level for the purpose of making § 441a(d) expenditures:

(A) FEC Disclosure Series No. 4: National Party Political Committee Receipts and Expenditures, Democratic and Republican—1976 Campaign at 31-40. This document demonstrates that the Democratic National Committee, the DNC Services Corporation, the Democratic Congressional Campaign Committee, and the Democratic Senatorial Campaign Committee made § 441a (d) expenditures in 1976. The Republican § 441 (d) expenditures are set forth at 36-40 for 1976.

(B) FEC Reports on Financial Activity 1977-1978, Final Report—Party and Non-Party Po-

litical Committees at 124-127. The chart at the bottom of page 125 shows the total § 441a(d) expenditures for the Democratic Party for all federal candidates during the 1978 election cycle, *i.e.*, $68,822 expended by the Democratic National Committee and no funds expended by the Democratic Congressional or Senatorial Committees. A similar chart for Republican expenditures appears at the bottom of page 127.

A computer check of the Commission's disclosure reports through June, 1980, disclosed that the Democratic National Committee had authorized the Democratic Congressional Campaign Committee to make one § 441a(d) expenditure in the amount of $4,500. *See* attached letter. Although the Federal Election Campaign Act does not require that agency agreements be filed with the Commission, the Democratic National Committee filed the attached authorization letter with one of its regularly-scheduled disclosure reports to clarify the § 441a(d) expenditure made by the Democratic Congressional Campaign Committee.

Since the propriety of agency agreements at the national level was not an issue in the district court, the record below does not contain references to these public documents on file at the Commission.

Sincerely,

/s/ Charles N. Steele
CHARLES N. STEELE
General Counsel

Enclosure
[Enclosures have been deleted
for purposes of this brief]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ELECTION COMMISSION

and

NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
Petitioners,

v.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Must the courts defer to the Federal Election Commission's interpretation of 2 U.S.C. § 441a(d), when its interpretation conflicts with the plain language of that provision, and when the basis of that interpretation is neither clearly nor consistently stated?

2. May 2 U.S.C. § 441a(d), which assigns special spending authority to State party committees and their subordinate committees, be construed to allow those committees to transfer that authority to another political committee through the device of "agency" agreements?

3. Is a prohibition on State committee "agency" agreements under 2 U.S.C. § 441a(d) an impermissible infringement on any First Amendment rights of speech and association?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-939

FEDERAL ELECTION COMMISSION

and

No. 80-1129

NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
Petitioners,

v.

No. 80-2074

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT

OPINIONS BELOW

The October 9, 1980, opinion of the court of appeals is not yet officially reported but appears at Appendix A of the Respondent's Brief In Opposition at A1. The order and opinion of the district court, and the determination of the FEC dismissing respondent's complaint, are also not officially reported and appear in that Appendix at B1 and C1, respectively.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1980. A petition for rehearing, application to recall mandate, and suggestion for rehearing *en banc* were denied on October 11, 1980. Petitions for a writ of certiorari were filed by the Federal Election Commission

and the National Republican Senatorial Committee on December 10, 1980 and January 6, 1981, respectively, and were granted on March 2, 1981. Jurisdiction is conferred by 2 U.S.C. § 437g(a)(9), 28 U.S.C. § 1254(1) (1980).

STATUTES INVOLVED

2 U.S.C. § 437g(a)(8), (9) provides in pertinent part:

> (8)(A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1) . . . may file a petition with the United States District Court for the District of Columbia. . . .
>
> (C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint . . . is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.
>
> (9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

2 U.S.C. § 441a(d)(1), (3) provide:

> (d) *Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office.*
>
> (1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national

committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or (ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner of any other State, $10,000.

STATEMENT OF THE CASE

Section 441a(d) of the Federal Election Campaign Act of 1971 ("the Act" or "FECA"), as amended, 2 U.S.C. § 441a(d),[1] grants to certain specifically defined "political committees" special spending authority in general election campaigns for the United States Senate. Those commit-

[1] The Federal Election Campaign Act of 1971, P.L. 92-225, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, P.L. 93-443, 88 Stat. 1263; as amended by the Federal Election Campaign Act Amendments of 1976, P.L. 94-283, 90 Stat. 475; as amended by the Federal Election Campaign Act Amendments of 1977, P.L. 95-216, 91 Stat. 1565; and as amended by the Federal Election Campaign Act Amendments of 1979, P.L. 96-187, 93 Stat. 1339.

tees are (1) "the national committee of a political party" and (2) "a State committee of a political party, including any subordinate committee of a State committee." [2] 2 U.S.C. § 441a(d)(3). Each of these named party committees is allowed to spend the greater of $20,000, or "2 cents multiplied by the voting age population of the State," on behalf of their party's candidates for the United States Senate. 2 U.S.C. § 441a(d)(3)(A). The spending power conferred by § 441a(d) on these committees exceeds that allowed other types of political committees or individuals.[3]

Beginning in 1976, pursuant to regulations promulgated by the Federal Election Commission ("FEC"),[4]

---

[2] 2 U.S.C. § 431(14) defines "the national committee" as "the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the national level, as determined by the Commission." The Republican National Committee is the "national committee" of the Republican Party. 2 U.S.C. § 431(15) defines "State committee" as the "organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level, as determined by the Commission."

[3] Individuals are subject to the following limits: (1) $1,000 per candidate, per election; (2) $5,000 to any "political committee" in a calendar year; (3) $20,000 to the political committees "established and maintained by a national political party"; and (4) a $25,000 limit overall on all contributions made in a calendar year. *See* §§ 441a(a)(1) and 441a(a)(3). Political committees may contribute $1,000 to a candidate per election; "multi-candidate" committees may contribute $5,000. 2 U.S.C. §§ 441a(a)(2) and 441a(a)(4).

[4] *See* 11 C.F.R. § 110.7. Until this litigation, when the FEC disavowed this interpretation before the Court of Appeals, that agency had consistently construed this regulation to authorize the national committee to make § 441a(d)(3) expenditures through any "agent." Now the FEC contends that this regulation only authorizes the national committee to appoint an "agent" to make § 441a(d)(2) expenditures in the *Presidential* elections, and that it does not bear in any way on § 441a(d)(3) expenditures in *Congressional* races.

the national committee of the Republican party, the Republican National Committee, designated the National Republican Senatorial Committee ("NRSC") as its "agent" for purposes of § 441a(d)(3) expenditures.[5] The NRSC is a "political committee" registered with the Federal Election Commission and established by Republican members of the U.S. Senate to support incumbent and nonincumbent Republican candidates for the Senate. The "agency" arrangement in question consisted, simply, of the NRSC's assumption of the national committee's expenditure limit, and its expenditure of its own funds under those limits.

In 1978, various State committees of the Republican party also designated the NRSC as their "agent" under § 441a(d) and purported to transfer their spending authority under that section to the NRSC. While purportedly an "agent," NRSC in fact was the "principal," spending its own money as it saw fit under limits expressly accorded by § 441a(d)(3) to the State committees.[6] Unlike the case of the national committee "agency" arrangements, no statutory provision or Commission regulation expressly authorized these agreements with State committees.

By virtue of this "agency" device, the NRSC was able to draw upon, for its own account, the total composite

---

[5] On the basis of this regulatory authority, the Democratic Senatorial Campaign Committee also entered into an "agency" agreement with the national committee of the Democratic party, the Democratic National Committee.

[6] Thus, the NRSC's description of this arrangement as a standard legal "agency" relationship is incorrect. NRSC Br. at 13. It is equally incorrect for NRSC to suggest that these agreements "facilitate the 'pooling' of resources by coalitions of voters." NRSC Br. at 19. The resources of the NRSC and the State committees are not pooled in the true sense of the word; the NRSC simply takes the State committees' spending *authority* and proceeds to spend its own funds under that authority.

spending ceiling of $3,487,020.80 available to all 34 Republican State committees with Senate races in their States in 1980.[7] The record below demonstrates that, through these agreements in various states, NRSC has been able to use the authority of the State committees to become the most significant funding source for Republican Senate candidates.[8] The State committees, however, have disappeared altogether as a significant factor in § 441a(d)(3) financing.[9]

In a complaint filed with the FEC on May 9, 1980 (designated by the FEC as Matter Under Review ("MUR") No. 1234), the Democratic Senatorial Campaign Committee ("DSCC") challenged the NRSC's "agency" agreements with State party committees.[10] After receiving a response from the NRSC, the FEC General Counsel on July 8, 1980, issued his "First General Counsel's Report" to the Commission, which recommended that the Commission find no "reason to believe" that NRSC's "agency" arrangement with State commit-

---

[7] *See* Jt. App. (Ct. App.) at 106.

[8] For example, as a result of these agreements, NRSC could use the California State committee § 441a(d) spending limit of $485,024.00, and the New York State party limit of $379,717.12. *See* Jt. App. (Ct. App.) at 106.

[9] *See* Jt. App. (Ct. App.) at 100-01.

[10] This challenge had been raised and dismissed by the FEC on two prior occasions only the year before. *In Re National Republican Senatorial Committee* (MUR 780) and *In Re National Republican Senatorial Committee* (MUR 820). DSCC did not challenge NRSC's "agency" agreement with the national committee, which in the view of the FEC at that time, had the special sanction of Commission Regulation 11 C.F.R. § 110.7. That regulation like all Commission Regulations had been reviewed by Congress under the FECA's one-house veto provision, 2 U.S.C. § 438(d). The FEC subsequently changed its position and now asserts that this regulation does not authorize the "agency" agreement between the Republican National Committee and the NRSC. *See* n.3, *supra*.

tees violated § 441a(d). On July 10, 1980, the Commission itself considered MUR 1234 and by a 6-0 vote found "no reason to believe" that the FECA had been violated.[11] However, the Commission gave no reasons to explain its action and did not adopt the First General Counsel's Report.

On July 30, 1980, DSCC filed a petition in the United States District Court for the District of Columbia, pursuant to 2 U.S.C. § 437g(a)(8), for review of the FEC's action. That petition sought a declaration that the dismissal of the DSCC's administrative complaint was contrary to law because § 441a(d)(3) does in fact prohibit the NRSC "agency" arrangements with State committees. The parties stipulated to an expedited schedule in which the matter was to be resolved by cross-motions for summary judgment. The District Court heard the matter on August 22. In a decision rendered on August 28, the District Court upheld the FEC's view that § 441a(d)(3) did not prohibit NRSC-State committee "agency" arrangements, and dismissed the action on the grounds that the agency's finding was not "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."[12]

On September 4, 1980, DSCC docketed its appeal of the District Court decision in the United States Court of Appeals for the District of Columbia Circuit. On September 9, 1980, NRSC moved to intervene, and that motion was granted on September 22. Following full briefing and oral argument on an expedited schedule, the Court of Appeals reversed the District Court and held that the FEC's interpretation authorizing the challenged agency agreements was "contrary to law." The Court of Appeals specifically held that the "clear language" of

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[11] *See* Jt. App. (Ct. App.) at 58.

[12] *See* Jt. App. (Ct. App.) at 159-60.

§ 441a(d) precluded the challenged "agency" arrangements whereby NRSC assumed the limits specifically allocated by Congress to State party committees.[13] On October 10, NRSC filed a petition for rehearing with a suggestion for rehearing *en banc* and an application to recall the mandate. On October 11, the Court of Appeals denied both of these motions.[14]

On October 16, NRSC applied to the Chief Justice of the United States for an order staying enforcement of the Court of Appeals' decision, pending disposition of its petition for a writ of certiorari. On October 16, the Chief Justice entered an order temporarily staying the decision below. Following a motion by DSCC on October 17, the full Court on October 21 refused to vacate this temporary stay.[15] DSCC then filed a motion for expedited consideration on October 27. The Chief Justice denied this motion as moot on October 28.[16] Thus, the stay entered by the Chief Justice on October 16 remains in effect.

The FEC and the NRSC filed timely petitions for writs of certiorari, and DSCC filed a brief in opposition. On March 2, 1981, this Court granted the petitions of FEC (No. 80-939) and NRSC (No. 80-1129), and consolidated the cases for briefing and argument.[17]

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[13] *See DSCC* v. *FEC* (No. 80-2074) at A14 (D.C. Cir. October 9, 1980) (hereinafter cited as *DSCC* v. *FEC* with page citations to Appendix to DSCC Brief in Opposition to FEC's and NRSC's Petitions for Certiorari).

[14] *See* DSCC Opp. at E1-E2.

[15] *See* Jt. App. at 8.

[16] *See* Jt. App. at 9.

[17] In opposing the issuance of a writ of certiorari in this case, DSCC contended, *inter alia*, that the passage of the 1980 Congressional elections had rendered this case "moot." In light of this Court's analysis of a similar mootness issue in the recently decided *Democratic Party of the United States* v. *LaFollette*, —— *U.S.* ——, 101 Sup. Ct. 1010, 1015, n.13 (1981). DSCC will not pursue this issue further in this case.

SUMMARY OF ARGUMENT

I. A. The FEC's attempt to avoid judicial review in this case cannot be reconciled with § 437g of the Act, which provides specifically for review of that agency's decision to dismiss a complaint. 2 U.S.C. § 437g(a)(8)(A). Moreover, cases decided under the FECA have established that the FEC's action in dismissing a complaint is subject to judicial review under an "arbitrary, capricious and contrary to law" standard. *Hampton* v. *Federal Election Commission*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9036 (D.D.C. 1977), *aff'd*, No. 77-1546 (D.C. Cir. July 21, 1978); *Gelman* v. *Federal Election Commission*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9130 (D.C. Cir. July 18, 1980) *cert. denied*, 49 U.S.L.W. 3227 (No. 80-209).

B. Since § 441a(d) unambiguously confers special spending authority in Congressional elections on State committees and their subordinate committees, it cannot be read to authorize "agency" agreements whereby NRSC, a national party committee, assumes this authority for its own purposes. The FEC's authorization of these agreements is therefore plainly "contrary to law," and deference by this Court is inappropriate. *Securities and Exchange Commission* v. *Sloan*, 436 U.S. 103, 118 (1978).

C. Apart from its failure to give effect to the plain meaning of § 441a(d), the FEC cannot claim "deference" where, as here, its decision making is devoid of clarity, coherence or consistency. Over a two year period, in the course of which the FEC addressed this issue three times, it repeatedly changed rationales for decisions and reversed itself on significant points of interpretation. In short, the FEC engaged in decision making lacking in the elemental qualities warranting deference from the courts. *Adamo Wrecking Company* v. *United States*, 434 U.S. 275, 287 (1978).

D. In its most recent shift of position, the FEC contends for the first time that the FECA's advisory opin-

ion and rule-making procedures, not a § 437g enforcement action, were the appropriate vehicles for resolution of DSCC's complaint. This most recent contention of the agency would entirely undercut the judicial review provisions of § 437g and would effectively deprive DSCC and similarly situated complainants of judicial review of the agency's refusal to honor the plain terms of the statute. 2 U.S.C. § 437g(a)(8)(A); *National Conservative Political Action Committee* v. *Federal Election Commission*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9057, *modified* and *aff'd*, 626 F.2d 953 (D.C. Cir. 1980).

II. A. Section 441a(d) unambiguously confers special spending authority on State committees by name, and it authorizes those committees to share their limits with, or transfer them to, their "subordinate" committees only. 2 U.S.C. §§ 441a(d), 441a(d)(3). The FEC's own implementing regulations make it clear that the spending authority in question is specific to the State committees and their subordinate committees, 11 C.F.R. § 100.7(b)(1), and that this authority was *not* meant to be "fungible" in nature and thus available to *any* party committee, whether national, State or local. Accordingly, the challenged practice whereby a national committee, the NRSC, substitutes itself for the State and subordinate committees under § 441a(d) conflicts with both the statute and FEC Regulations, and with standard canons of statutory construction. *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955).

B. Moreover, Congress made plain its intent in § 441a(d) to provide a mechanism for State and local, as well as national, party spending in Congressional elections. *See, e.g.*, S. Rep. No. 93-689, 93rd Congress, 2nd Session. Nowhere does the legislative history indicate the contradictory intention that State and local committee authority be transformed into a supplement to a national committee's, the NRSC's, spending limit. The concern with State committee spending power in § 441a(d) is

mirrored throughout the Act, where special provision is made for State and local party involvement in the federal electoral process. *See, e.g.*, 2 U.S.C. §§ 431(8)(B)(x), (xii), 431(9)(B)(viii), (ix). Section 441a(d) may only be understood and construed with reference to this pervasive statutory concern with State and local party involvement. *Gelman* v. *Federal Election Commission, supra; Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973).

III. A. NRSC fails to state a legitimate constitutional claim in alleging that § 441a(d) cannot be construed to bar NRSC-State committee "agency" agreements without impermissibly infringing on the First Amendment rights of the Republican party, any of its constituent committees and individual Republicans. This claimed injury to constitutional rights is not supported in any way by the record in this case, and it cannot therefore be sustained. *Martin Tractor Co.* v. *Federal Election Commission*, 627 F.2d 375 (D.C. Cir. 1980) (*en banc*), *cert. denied sub nom., National Chamber Alliance for Politics* v. *Federal Election Commission*, 439 U.S. 958, 101 Sup. Ct. 360 (1980); *Buckley* v. *Valeo*, 424 U.S. 1 (1976). Moreover, since NRSC and the State committee may achieve the same level of association as "agency" agreements through different means, any burden on First Amendment rights resulting from a ban on "agency" agreements follows from the NRSC's own choice, not from the statute itself.

B. If it is assumed that a ban on agency agreements does burden First Amendment rights, any such burden is marginal and is outweighed by a compelling State interest in promoting the development of State and local party organizations.

B.1. Section 441a(d) expenditures are defined by statute as, and are functionally no different from, "contri-

butions," which may be limited with "little direct restraint . . . on political communications." *Buckley* v. *Valeo, id.*

B.2. Moreover, any limitation on these expenditures through a ban on "agency" agreements would leave unimpaired the substantial spending authority and other associational vehicles available to the Republican party, its constituent committees, and individual Republicans. Thus, any infringement resulting from the "prohibition" on NRSC-State committee "agency" agreements is wholly marginal. *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. 280 (S.D.N.Y. 1980), *aff'd*, 616 F.2d 1 (2d Cir.), *en banc*, *aff'd*, 48 U.S.L.W. 3662 (April 14, 1980).

B.3. At the same time, the State interest in promoting State and local party development, which underlines § 441a(d)(3) spending authority, is sufficiently compelling to overcome any marginal infringements on the First Amendment rights. This interest receives expression throughout the Act, *see, e.g.*, 2 U.S.C. §§ 431(8)(B)(x), (xii), 431(9)(B)(viii), (ix), and is grounded in fundamental concerns with a vibrant federalism.

B.4. Nor does a prohibition of NRSC-State committee "agency" agreements render the statute unconstitutionally vague. Section 441a(d) could not be clearer in its requirements, and "[t]he rule of construction to be invoked when constitutional problems lurk in an ambiguous statute does not permit disregard of what Congress commands." *United States* v. *UAW*, 352 U.S. 567, 589 (1957).

ARGUMENT

I. THE FEC'S DETERMINATION IN THIS CASE IS PLAINLY ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW AND CANNOT BE SUSTAINED UNDER "DEFERENCE" PRINCIPLES.

A. Congress Provided Specifically for Judicial Review of Any FEC Determination to Dismiss a Complaint.

In its attempt to escape judicial review of its decision to dismiss DSCC's complaint, the FEC likens that decision to "a determination not to proceed with an administrative investigation, a classic discretionary power." [18] The FEC suggests that its action is committed by law to its discretion, and may not be reviewed by the courts.[19]

The FECA itself wholly refutes that contention. Section 437g provides specifically that "[a]ny party aggrieved by an order of the Commission dismissing a complaint" may seek review in the United States District Court for the District of Columbia. 2 U.S.C. § 437g(a)(8)(A). Upon review, the Court is empowered to "declare that the dismissal of the complaint . . . is contrary to law, and may direct the Commission to conform with such declaration within 30 days . . . ." [20] 2 U.S.C. § 437g(a)(8)(C). This judgment of the District Court is appealable to the Court of Appeals and ultimately to this

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[18] FEC Br. at 21.

[19] Thus, the FEC cites two cases, deciding under statutes *other than* the FECA, to support the proposition that its decision in this case is "not reviewable," or "committed to [its] discretion." FEC Br. at 21-22, *citing City of Chicago* v. *United States*, 396 U.S. 162, 165 (1969); *General Motors Corp.* v. *Federal Energy Regulatory Commission*, 613 F.2d 939, 944 (1979).

[20] The Act also provides that, in the event that the agency fails to conform with the District Court order, the complainant may bring an action in his own name to remedy the violation alleged. 2 U.S.C. § 437g(a)(8)(C).

Court. 2 U.S.C. § 437g(a)(9). Thus, the statutory scheme unambiguously subjects agency actions, such as the one now before this Court, to judicial scrutiny.

It is no less settled that, in reviewing the FEC's dismissal of a complaint, the reviewing court will not affirm the agency's action if it was "arbitrary, capricious and contrary to law."[21] Deference is only appropriate where the agency has provided "an adequate statement of reasons which demonstrate a rationale and defensible basis for his [its] decision . . . ." *Hampton* v. *Federal Election Commission, supra.* This deference to the FEC's dismissal of a complaint is not, as the FEC suggests, virtually unqualified, but hinges on judicial analysis of the agency's decision making. The case law developed under the FECA clearly demonstrates that courts have not abstained, under "deference" principles, from a careful review of the basis for the agency's decision. *See, e.g., Hampton* v. *Federal Election Commission, id.,* (examination by the court revealed that FEC's reasons for its actions "adequately demonstrate a rationale and defensible basis for its decision"); *Gelman* v. *Federal Election Commission, supra* (Court upholds decision on grounds that it is clearly "consistent with the language adopted by Congress and with the apparent purpose of the 1976 amendments to the Act.").[22] The FEC itself has acknowl-

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[21] Although it asserts that its decision to dismiss DSCC's complaint was an unreviewable exercise of its investigatory discretion, the FEC ultimately concedes that its decision is subject to review on an "arbitrary, capricious and contrary to law" standard. FEC Br. at 21. NRSC also concedes that applicability of this standard. NRSC Br. at 32.

[22] *See also In re Federal Election Campaign Act Litigation,* Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9082 (D.D.C. 1979) at 50,663 (complaint dismissed by FEC was a "shambles" lacking

edged that, in reviewing agency actions under § 437g, the courts have been required to examine "the reasoning set forth in the General Counsel's report [citations omitted], as well as the face of the complaint, the evidence provided to the Commission, and the arguments put forth in the briefs." FEC Memorandum in Support of its Motion for Summary Judgment, *National Republican Senatorial Committee* v. *Federal Election Commission*, (D.D.C. Civil Action No. 80-2266) p. 9, n.12.

Thus there is no authority for the FEC's contention here that the courts cannot hold the agency to a consistent or coherent analysis in support of its position in a § 437g proceeding.

B. The NRSC-State Committee "Agency" Agreements Upheld by the FEC are Plainly Contrary to Law.

2 U.S.C. § 441a(d) sets forth, in clearest terms, a special grant of spending authority in Congressional elections to two separately named, separately defined entities: "the national committee of a political party," and the "State committee of a political party, including any subordinate committee of a State committee." [23] This provision does not contain any complicated grammatical construction or ambiguous wording. No other political

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in any evidence to support the charges made); *National Republican Senatorial Committee* v. *Federal Election Commission*, (D.D.C. Civil Action No. 80-2266) (review of agency record establishes that FEC properly exercised its discretion).

[23] *See* n.1, *supra*, for the specific statutory definitions of the term "State committee" and "the national committee." FEC Regulations implementing § 441a(d) are found at 11 C.F.R. § 110.7. A "subordinate committee of a State committee" is defined by FEC Regulations as "any organization which is responsible for the day-to-day operation of the political party at the level of city, county, neighborhood, ward, district, precinct, or any other subdivision of a State or any organization under the control or direction of the State committee." 11 C.F.R. § 100.14(b).

committees are provided with these special spending limits in Congressional elections.

Notwithstanding the clarity of this provision, the FEC has interpreted it in a manner wholly at variance with its plain terms and meaning. In place of the State party committee, the FEC would substitute the NRSC, which is neither a "State committee" nor the "subordinate committee of a State committee."[24] The FEC would accomplish this result through its authorization of "agency agreements," which, while clothed in standard legal "agency" terminology, are no more than a mechanism by which NRSC arrogates unto itself the spending ceilings of State committees.

Thus, the FEC's construction of § 441a(d), whereby the spending authority assigned by statute to State committees may be taken by NRSC, is plainly contrary to law and not entitled to deference upon judicial review. The agency has failed to follow the fundamental principle that "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted Mills* v. *United States*, 278 U.S. 282, 289 (1929); *accord*, *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974).[25] Congress has spoken clearly in § 441a(d), and an appeal to "deference" in matters of statutory construction does not entitle the FEC to rework Congressional will by

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[24] The FEC Regulations define NRSC as one of the "political committees established and maintained by a national political party." 11 C.F.R. § 110.1(b)(2). Thus, NRSC is an organ of the national political party, and is in no way connected or associated with State committees or any other subordinate committees.

[25] This rule of construction was embraced specifically by the FEC in another context, *see* Federal Election Commission's Motion to Dismiss in *Barnstead for Congress Committee* v. *Federal Election Commission*, No. 79-0054 (D.D.C. 1979), but was nevertheless abandoned as a guide in its interpretation of § 441a(d) in this case.

allowing § 441a(d) spending authority to be transferred from the State committees to NRSC. "[T]he courts are the final authorities on issues of statutory construction, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 . . . , and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'" *Securities and Exchange Commission* v. *Sloan, supra, quoting Volkswagenwerk* v. *FMC*, 390 U.S. 261, 272 (1968).

C. The Reasoning of the FEC's General Counsel in the Administrative Proceedings Below, and of the FEC in This Litigation, Has Lacked Clarity and Consistency.

On three separate occasions, the FEC has been confronted with challenges to the NRSC-State committee "agency" agreements at issue in this case. In each instance, the FEC has dismissed the challenge without any written (or, for that matter, oral) statement of reasons for its decision.[26] In the absence of any such statement

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[26] The FEC's refusal to supply decisions in § 437g enforcement proceedings is a matter of agency policy and practice. *See Note, The Federal Election Commission, First Amendment and Due Process*, 89 Yale L.J. 1199, 1211 (1980). Moreover, the First General Counsel's Report, which forms the basis for his recommendations to the agency, may not serve as an adequate substitute for formal written agency decision, since the FEC specifically advises that its decision in § 437g cases "are not necessarily based on, or in agreement with, the General Counsel's analysis." *See* FEC *Record*, the agency's official publication, August 1980 edition, p. 10. The FEC's unwillingness to justify its administrative decision making—and its reliance in litigation on post hoc rationalizations for such decision making—impede any effort by the courts to determine whether agency action warrants deference or was instead "arbitrary, capricious and contrary to law." *Dunlop* v. *Bachowski*,

of reasons, resort must be made to the FEC's First General Counsel's Report in attempting to identify a rationale for the agency's decision.

In the first decision upholding § 441a(d)(3) agency agreements between the NRSC and the State committees, MUR 780, the General Counsel relied principally on "the absence of any specific prohibition" of such agreements.[27] Subsequently, in MUR 820, the General Counsel emphasized a regulation, 11 C.F.R. § 110.7(a)(4), which he construed to authorize agency agreements between the *national* committee of a political party and any agent, including the NRSC.[28] The Commission apparently reasoned that this regulation also supported a similar agency agreement between the NRSC and State party committees. In MUR 820, the General Counsel relied, for the first time, on FECA § 441a(a)(4), which authorizes unlimited transfers of funds among committees of the same political party.[29] Although noting that the

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Inc., 421 U.S. 560, 573 (1975); *Burlington Truck Lines* v. *United States*, 371 U.S. 167 (1962) (Court unable to find "indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice.").

[27] *In Re National Republican Senatorial Committee* (MUR 780), First General Counsel's Report at 2.

[28] *In Re National Republican Senatorial Committee* (MUR 820), First General Counsel's Report, p. 3. Section 110.7(a)(4) states that "[t]he national committee of a political party may make expenditures authorized by this section through any designated agent, including State and subordinate party committees." The FEC has reversed this interpretation of § 110.7(a)(4) and now contends that it applies *only* to § 441a(d)(2) expenditures in Presidential elections and does not authorize "agency" agreements for purposes of § 441a(d)(3) expenditures in Congressional races. *See* n.3, *supra*.

[29] Section 441a(a)(4) authorizes unlimited transfers "between and among political committees which are national, State, district, or local committees . . . of the same political party." The General

agency agreements at issue here involve transfers of *spending authority*, not funds, the General Counsel dismissed the critical difference as one of "form over substance."

In addressing the complaint in this action, the agency once again recast its argument. After reviewing its analysis in MUR 780 and 820, the General Counsel conceded that "in retrospect" one of the arguments previously relied upon—that anything not specifically prohibited by the Act is allowed—was the "weaker" of the grounds asserted in support of § 441a(d)(3) agency agreements.[30] Perhaps to compensate for the perceived "weakness," he introduced, for the first time, the alleged significance of the House of Representatives rejection in 1978 of a bill, H.R. 11315. That bill would have, *inter alia*, prohibited intraparty transfers for the purpose of making contributions or expenditures. Although this bill addressed transfers of funds, not of spending authority, the General Counsel nonetheless viewed this postenactment legislative history as somehow dispositive of the issue raised under § 441a(d).[31]

This confusion and inconsistency did not end with DSCC's appeal to the federal courts. In its Memorandum of Points and Authorities accompanying its Cross-Motion for Summary Judgment before the District Court, the FEC based its *de facto* approval of agency agreements on (1) the FECA's authorization of intraparty fund transfers (2 U.S.C. § 441a(a)(4)), and (2) on the postenactment legislative history derived from the House

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Counsel reasoned that if NRSC could transfer funds to the State committee for § 441a(d)(3) purposes, it was somehow "immaterial" if NRSC avoided any transfer altogether and substituted itself for State committees by assuming their spending authority.

[30] *In re National Republican Senatorial Committee* (MUR 1234), First General Counsel's Report at 4.

[31] *See* n.38, *infra*.

rejection of H.R. 11315. Upon oral argument before the District Court, however, the FEC opened with an appeal to the principle, already once disavowed by the General Counsel, that anything not prohibited by the Act was allowed.[32]

In the proceeding before the Court of Appeals, the FEC's position underwent further transmutation when the FEC reversed its prior interpretation of 11 C.F.R. § 110.7(a)(4). FEC had previously interpreted this regulation to authorize agency agreements between the Republican National Committee and the NRSC for purposes of § 441a(d)(3) expenditures in Congressional elections. Before the Court of Appeals, the FEC now took the new position that § 110.7(a)(4) did not apply at all to House or Senate elections; rather it applied only to spending by party committees on *Presidential* campaigns pursuant to § 441a(d)(2).[33]

Finally, in this Court, the Commission has taken the wholly different tack of suggesting that the Commission's law enforcement procedures were not the appropriate administrative vehicle for disposition of this case.[34] The agency now states that the advisory opinion process or formal rule-making procedures of § 437g were the only appropriate vehicles for resolution of DSCC's complaint. Yet at no previous time in the course of this proceeding (either at the agency level below or in this litigation), did the Commission ever suggest, as it now does, that it was *procedurally* barred from construing the plain terms

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[32] The District Court responded immediately by asking counsel for the FEC "isn't it an unusual point of view that you think that something would be included unless it is excluded specifically?" Following explanation by counsel, the court concluded that "that particular argument hasn't too much to recommend it." Tr. at 14.

[33] FEC Br. (Ct. App.) at 9.

[34] FEC Br. at 26-30.

of § 441a(d)(3) in the context of an enforcement action. Not surprisingly, the FEC has introduced no authority for this novel principle of administrative law.

The erratic and confused course of the General Counsel's and the FEC's decision making in this case does not warrant judicial deference. Deference is based on the assumption that the agency will have rendered a persuasive analysis of the statute, its legislative history, and the regulatory problem to which the statute was addressed. *See Securities and Exchange Commission* v. *Sloan*, *supra* at 117-18; *Adamo Wrecking Co.* v. *United States*, *supra* at 287, n.5. Thus, the legal principle of "deference" is not applied automatically or reflexively to uphold any agency determination. Agency "discretion" is not blanket authorization for inconsistent and conflicting reasoning, especially where the agency in question seeks to impose on a statutory provision an interpretation without support in its plain language or its legislative history.

D. The Advisory Opinion and Rule-Making Procedures Were Not Appropriate Vehicles for Achieving a Vindication of the Plain Terms and Purposes of § 441a(d).

FEC contends before this Court, for the first time in this litigation, that the enforcement procedures of 2 U.S.C. § 437g[35] were not the appropriate vehicles for resolution of DSCC's complaint. In the FEC's view, the relief sought by DSCC, namely, enforcement of the plain terms of § 441a(d), could only be achieved by resort to the FECA's advisory opinion and rule-making

[35] As stated above, the FEC at no time, either in writing or orally, advised DSCC or otherwise took the position that the enforcement process was an inappropriate vehicle for resolution of the issue in this case. By introducing this argument at this stage, the Commission is demonstrating once again its refusal to hold to any coherent rationale for its decision.

procedures. For this reason, the FEC concludes that "[n]ot only should the court have deferred to the Commission's expert construction of § 441a(d), but to the extent that the court deemed such a construction inadequately supported by the statute, the court was required to refer DSCC to FECA's advisory opinion and rule-making procedures." [36]

The FEC's argument makes a shambles of the judicial review provisions of § 437g. If accepted by this Court, that argument would require that whenever a complainant appealed a plainly erroneous construction of the Act, the reviewing court would have the limited choice of either deferring to the erroneous construction, or avoiding review altogether by "referring" the complainant to the FECA's advisory opinion or rule-making procedures. Under the FEC's theory, as applied, the FEC's construction of the Act in § 437g enforcement proceedings could *never* be reversed; yet the Act explicitly provides for judicial review—and potential reversal—of agency actions in such proceedings.

The Commission supports its position by suggesting that, where it previously misconstrued the statute, it may only correct itself by creating a "new rule" through formal rule-making procedures.[37] Yet enforcement of a statute as Congress wrote it does not require the promul-

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[36] FEC Br. at 32.

[37] The Commission suggests that a "new rule" is created whenever a reviewing court reverses an agency interpretation which is allegedly "supported by statutory language and legislative history and, by way of analogy, by a Commission regulation and an advisory opinion." FEC Br. at 30. The Commission misses the fundamental point, namely, that in reversing the agency, a court might disagree precisely over whether such "support" for the interpretation in question exists. Under the agency's definition of a "new rule," it could never be reversed on a plainly erroneous construction of the statute.

gation of a "new rule."[38] Moreover, relegating DSCC and similarly situated complainants to either the advisory opinion or rule-making process would deprive them of judicial review of the FEC's determinations in § 437g proceedings. *National Conservative Political Action Committee* v. *Federal Election Commission, supra; Martin Tractor Co.* v. *Federal Election Commission, supra.*

Accordingly, the Commission's attempt to rewrite (and to circumscribe substantially) the judicial review provisions of § 437g is wholly meritless.

II. THE FECA CANNOT BE READ TO AUTHORIZE NRSC-STATE COMMITTEE "AGENCY ARRANGEMENTS" UNDER § 441a(d).

A. Section 441a(d) Plainly Precludes Transfers of State Party Committee Spending Authority to the NRSC.

Central to this appeal is the appropriate interpretation of a statute, 2 U.S.C. § 441a(d). The NRSC, if not the FEC, concedes that, "[t]he starting point for interpreting [the] statute is the language of the statute it-

[38] In any event, NRSC greatly overstates the harm that it will suffer if the FEC reverses itself in this fashion on a prior course of interpretation. Contrary to NRSC's assertion, this case presents no question of a "knowing and willful" violation of the FECA; nor is the FEC bound to impose a civil penalty if circumstances do not warrant it. At most, FEC enforcement of a court order invalidating State committee agency agreements under § 441a(d) would result in settlement with the NRSC through "informal methods of conference, conciliation, and persuasion" culminating in a "conciliation agreement." *See* 2 U.S.C. § 437g(a)(4)(A). Finally, whatever consequences to NRSC follow from this case were avoidable by that committee, since DSCC brought this action early in 1980 before any of the expenditures in question had been made and when NRSC had not, by its own admission, "finalized its plan as to how it [would] support Republican candidates." Jt. App. (Ct. App.) at 32.

self."[39] NRSC Br. at 11, *citing Consumer Product Safety Commission* v. *GTE Sylvania*, 100 Sup. Ct. 2051, 2056 (1980). This concession is dispositive of the central issue in this case, for a straightforward examination of § 441a(d) establishes that it does not allow for the transfers of statutory spending authority achieved through NRSC's "agency arrangements" with the State party committees.

There is nothing confusing or ambiguous in the wording of § 441a(d) to support the gloss offered by the FEC. The provision confers special spending authority in Congressional elections upon two explicitly named political committees: the national committee of a political party, and the State committees of a political party, including any subordinate committee of a State committee. Each of the political committees legally entitled to use of this spending authority is statutorily defined.[40] Under the construction advanced by the FEC, however, the State committees may be replaced altogether by NRSC, which is nowhere named or otherwise referred to in § 441a(d) and which is concededly not a "State committee." By nullifying the role of State committees under § 441a(d) in this fashion, the FEC ignores the principle that, in matters of construction, every effort must be made to " 'give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section." *United States* v. *Menasche*, *supra* at 538-39.

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[39] The FEC exhibits little concern with the plain language, except to assert that it does not expressly *rule out* the use of "agency" agreements. This is a variant of the "anything not prohibited is allowed" rule of construction that the agency or its General Counsel have made use of from time-to-time.

[40] The terms "national committee" and "State committee" of a political party are defined by statute. 2 U.S.C. §§ 431(14), 431(15). The term "subordinate committee of a State committee" is defined by regulation. 11 C.F.R. § 100.14(b).

The construction obvious from the face of § 441a(d) is echoed in the FEC's own regulations, 11 C.F.R. § 110.7 (b)(1), implementing this provision. Those regulations state that the national committee and any State committee "may *each* make expenditures" in connection with Congressional general elections in the specified amount. In this way, the FEC makes it clear that the spending authority is specific to *each* of the named committees; it precludes the construction, advanced by NRSC, that the authority is conferred upon all national and State party committees *as a group*, without regard to which committee within that group actually spends the money.[41]

Moreover, where Congress intended that State committees' § 441a(d)(3) limit be shared, it expressly so stated. Specifically, the statute allows a State committee's limits to be shared with any "subordinate committees of a State committee." Here again, the FEC's own regulations follow the express statutory scheme in specifying that "for limitation purposes State committees include subordinate committees" and that "State committees and subordinate committees *combined*" shall not exceed the specified limits of § 441a(d)(3) applicable to State committees by name. (Emphasis added.) It is apparent from the statute and from the implementing regulations of the FEC that State committees may only share their "2 cents per voter" limit with their subordinate committees. Nevertheless, FEC contends that State committees' § 441a(d)(3) limits may be shared by *all* the various committees of a

[41] The NRSC interprets § 441a(d) as a "broad" grant of authority for national and State committees, one that does not "restrict the methods which may be used by the national and State committees to expend monies within the overall dollar limits." NRSC Br. at 13. Had Congress intended this result, however, it would have fashioned an overall four cent limit applicable to all committees of a political party, either national or State. It did not do so, however, and the FEC cannot ignore Congress' choice of a different scheme.

political party including national party committees such as NRSC. This contention flies in the face of logic and fundamental canons of statutory construction.[42]

The clarity and precision of § 441a(d)(3) in delimiting State party committee spending authority also completely refutes FEC's reliance on the provision authorizing intraparty transfers of funds. This reliance is grounded on the assumption that transfers of funds and of spending authority are indistinguishable, and that if the first is allowed, so must the second. Yet where Congress sought to authorize transfers or sharing of limits by State committees, it did so clearly.[43] There would have been no need for Congress to provide specifically for this sharing if the transfer provision were assumed to accomplish the same result. Under the FEC's reading of the transfer provision and its relationship to § 441a(d), the language authorizing sharing by State committees with their subordinate committees is reduced to mere surplusage.[44]

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[42] NRSC further contends that if NRSC-State committee agency agreements must be prohibited, the same result applies to such agreements between the NRSC and the DSCC and their respective national committees. NRSC Br. at 13, n.16. While the legality of the latter agreements are not before this Court, it is noted here that entirely separate issues are presented by § 441a(d) agency agreements between organs of the same *national* party. *See, e.g.*, § 441a(h), where Congress acknowledged the close relationship between each party's national committee and its Senate campaign committee, such as NRSC, by authorizing them to share a $17,500 contribution limit in U.S. Senate elections.

[43] Similarly, where Congress sought to authorize sharing or transfer of the NRSC's $17,500 contribution limit under 2 U.S.C. § 441a(h), it specifically provided that that limit could be shared by "the national committee . . . or any combination of [the subordinate and national] committees."

[44] Also circuitous and meritless is FEC's reliance on post-enactment legislative history, namely the House's rejection on H.R. 11315, which sought to prohibit intraparty transfers of funds

In sum, § 441a(d)(2) presents no problems of construction. It is entirely lacking in any interpretative ambiguity or complexity. The provision plainly confers spending authority on specifically named and defined committees, including the State committees. Where Congress intended the State committees to share or transfer its limit, it was clear on the point. Any sharing by NRSC, or any other *national* committee, of State committees' § 441a(d) authority is plainly precluded.

B. Construction of § 441a(d) to Preclude NRSC-State Committee "Agency" Agreements is Consistent With the Overall Scheme of the Act.

The constructions urged by petitioners would completely undermine Congress' attempt in § 441a(d) to provide a vehicle for State and local party development in the political party process. Instead of stimulating State committee involvement in federal campaigns, the 2 cent limit assigned to those committees would be a mere supplement to the spending authority of a *national* party committee, the NRSC.

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for the purpose of making contributions and expenditures. First, H.R. 11315 was an omnibus bill amending the FECA; it was not directed solely to intraparty transfers of funds, nor was a separate vote on that issue taken. Second, the House addressed the bill on a proposed rule for consideration, and not on the merits. *See* 124 Cong. Rec. H2261-69 (daily ed. March 21, 1978). Third, the relevant provisions of H.R. 11315 would have prohibited transfer of funds, and not spending authority. Finally, the March 1978 House debate and vote occurred prior to *any* FEC ruling on the legality of NRSC-State committee agency agreements. Thus, there could hardly have been any interest within Congress in reversing an interpretation of § 441a(d) that the FEC had not yet rendered. These facts strongly support this Court's rule that postenactment legislative history "will rarely override a reasonable interpretation of a statute . . . ." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc., supra. See also Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978).

Petitioner NRSC concedes that Congress intended § 441a(d) as a means to "preserve the place of political parties in the elective process." [45] Of course, the political party structure in this country has always functioned on different levels, namely, local, State and national levels,[46] and the legislative history of § 441a(d) makes clear that Congress was concerned as much with State and local party development, as with promotion of the national party structure. *See* remarks of Senator Cannon, Chairman of the Senate Rules Committee and Member of the Conference, 120 Cong. Rec. 518, 525 (1974).[47] Not only did Congress emphasize the State and local party-building function, but there is no indication in the legislative history of § 441a(d) that Congress intended that NRSC, or any other national party committees, could supplement their own defined authority with State committees' 2 cent limit.

The State and local party-building concern is not reflected solely in § 441a(d), but is manifest throughout the Act. Thus, § 441a(a)(4) grants State committees a special exemption from one of the conditions precedent to "multi-candidate" status, an exemption designed to allow such committees to qualify more readily for a

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[45] *See* Pet. NRSC Br. at 12 (*citing* S. Rep. No. 93-689, 93rd Congress, 2nd Session, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 103 (1977)).

[46] *See infra* at 38-41.

[47] *See also* remarks of Representative Frenzel, a member of the Conference Committee, who explained on the floor § 441a(d)'s purpose in increasing "the role of political parties in campaign financing," and who emphasized the parallel federal and State focus of the provision in granting enhanced spending power to "[b]oth the national committee and the State committee of a political party." 120 Cong. Rec. H10,332 (daily ed. October 10, 1974).

higher $5,000 per candidate per election limit.[48] In addition, State party committees, and only State party committees, are exempted altogether from limits in spending for voter registration and "get-out-the-vote" drives on behalf of Presidential and Vice Presidential candidates, and in spending for campaign materials, such as buttons and bumper stickers, for use in "volunteer" activities on behalf of federal candidates.[49] These last two exemptions, in particular, are expressly and strictly contingent on the State committees funding these activities themselves, without receiving funds for this purpose from any national party committees.[50] Section 441a(d) is therefore fully consistent with these State and local party-building provisions.

This view of "overall purpose" of the statute is critical to a fair construction of § 441a(d), *Gelman* v. *Federal Election Commission*, *supra*, for each provision of the Act must be construed to give the statute as a whole " 'the most harmonious, comprehensive meaning possible' in light of the legislative policy and purpose." *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, *supra* at 631-32, *citing Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 488 (1947). The NRSC-State committee "agency

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[48] *See* 2 U.S.C. § 441a(a)(4). This provision defines the conditions that political committees must satisfy to qualify for the higher "multi-candidate" $5,000 per candidate per election limit. One such condition, that of making contributions to five or more federal candidates applies to all committees "except for any State political party organization."

[49] *See* 2 U.S.C. §§ 431(8)(B)(x), (xii) and 431(9)(B)(viii), (ix).

[50] *See* 11 C.F.R. §§ 100.7(b)(15)(vii), 100.7(b)(16)(vii). In discussing the exemption from limits for "volunteer" activities, the House Report stresses its "purpose . . . to encourage volunteers to work for and with local and State political organizations." H. Rept. No. 96-422, 96th Congress, 1st Session, *reprinted in* U.S. Code Cong. & Ad. News 2860, 2868.

agreements" under § 441a(d) cannot be reconciled with either the Congress' intent in fashioning this special limit for State and local party organizations, or with the Act's overall scheme of special support of State and local party activity and growth.

III. THE COURT OF APPEALS' DECISION NEITHER IMPLICATES NOR IMPERMISSIBLY BURDENS FIRST AMENDMENT RIGHTS TO EXPRESSION OR ASSOCIATION.

A. Petitioner NRSC has Failed to State a Legitimate Claim that a Bar to Delegations of § 441a(d)(3) Spending Authority Burdens the First Amendment Rights of the Republican Party, the State Party Committees or Individual Republicans.

The only question before the Court is whether NRSC may assume § 441a(d)(3) spending authority specifically assigned by Congress to the State party committees.[51] NRSC contends that to bar transfers of State committees' § 441a(d)(3) spending authority impermissibly burdens the First Amendment Rights of the Republican party, the State party committees and individual Republicans. Respondent DSCC respectfully submits that, for two reasons, NRSC has presented no proper constitutional claim.

First, NRSC has not alleged that § 441a(d)(3) is unconstitutional on its face. Rather, it argues that the Court of Appeals' interpretation of that section, as *applied*, will impede the exercise of First Amendment rights. NRSC asserts that State party committees'

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[51] The Court of Appeals noted, *DSCC* v. *FEC* at A13, n.28, and NRSC concedes, NRSC Br. at 20, n.28, that the constitutionality of the overall expenditure limits of § 441a(d)(3) are not at issue in this case.

rights will be burdened because they will be prevented from "economy of scale in expenditures from one source, . . . available expertise in creating and placing advertisements, . . . obtaining media exposure, [and] [*sic*] obtaining credit during the campaign." NRSC Br. at 23, *quoting DSCC* v. *FEC*, at A28-A29 (Wilkey, J. dissenting). NRSC also contends that a ban on delegations of § 441a(d) spending authority will burden the First Amendment rights of individual members of the Republican party by preventing them from "pooling" money through NRSC and thus amplifying their shared viewpoint into "an efficient political message." NRSC Br. at 23. Finally, it claims that a bar to delegations of spending authority will limit political expression by the Republican party as a whole. NRSC Br. at 25.

However, the record is devoid of evidence supporting any of these claimed injuries.[52] Thus, the record upon which NRSC asks this Court to rely is clearly inadequate to support "[t]he careful examination required for first amendment analysis [of statutes] 'as applied.'" *Martin Tractor Co.* v. *Federal Election Commission, supra. See Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111, 114 (1962).

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[52] Factual support is unlikely to exist, since, as discussed below, NRSC or the State committees may obtain the benefits NRSC claims in support of the challenged agreements through other means wholly consistent with § 441a(d)(3). Although NRSC may believe that delegations of spending authority are the most convenient means through which to obtain these benefits, a ban on the most convenient form of association does not impermissibly infringe First Amendment rights where substantially equivalent forms of associations are still available. *Buckley* v. *Valeo*, 424 U.S. 1, 22; *Republican National Committee* v. *Federal Election Commission, supra.*

In *Buckley* v. *Valeo*, this Court rejected a challenge to the constitutionality of the § 441a(a)(1) contribution limitations because the record failed to support petitioners' claims that these limitations impermissibly burdened petitioners' First Amendment rights. *See, e.g.*, 424 U.S. at 21-22, n.23, 26 & 27. In the present, as in *Buckley*, the alleged injuries are only speculative injuries and thus petitioner has failed to state a legitimate constitutional claim.[53]

Second, the constitutional burdens alleged by NRSC are not the work of § 441a(d) itself. Rather, any burden is the direct consequence of an entirely discretionary decision by the State party committees to delegate all spending authority to NRSC. In deciding to employ the delegation agreements, NRSC and the State committees rejected the many alternative means of effective intra-party cooperation available under the FECA and FEC Regulations.[54] Clearly, this is a case where "[i]nstead of persuading us that . . . a statute has imposed substantial burdens on the party's right to govern its affairs, appellants' own statement of the facts establishes that . . . the [party] . . . is the source of whatever

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[53] The lack of evidence in support of NRSC's constitutional claims reflects the fact that these claims were not before the District Court, and were raised in only a cursory manner immediately prior to oral argument before the Court of Appeals. This lack of record evidence, in conjunction with the Court's traditional reluctance to rule on Constitutional claims unnecessarily, *see United States* v. *UAW*, *supra* at 590-92 and *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), suggests that the Court should decline to rule on NRSC's First Amendment claims. Should NRSC in the future be able to make an appropriate factual demonstration" of the alleged infringement of First Amendment rights, *Buckley* v. *Valeo*, 424 U.S. at 95, n.129, it can proceed at that time to challenge the constitutionality of the prohibition on § 441a(d)(3) agency agreements with State committees.

[54] *See infra* at 35-38.

burdens they suffer." *Marchioro* v. *Chaney*, 442 U.S. 191, 199 (1979). Where as here, the alleged infringement of First Amendment rights results, not from the action of the State, but from appellant NRSC's choice of one of many available courses of action, no constitutional claim exists. *See Republican National Committee* v. *Federal Election Commission, supra, citing Corbitt* v. *New Jersey*, 439 U.S. 212, 218 (1978).

In sum, NRSC has presented no claim that § 441a(d)(3), as construed by the Court of Appeals, has burdened or may in the future burden in a constitutionally cognizable manner the rights of the Republican party, the State party committees, or individual Republicans.

B. A Bar to Delegations of 2 U.S.C. § 441a(d)(3) Spending Authority Imposes No Material Burden on the Exercise of First Amendment Rights and is Outweighed by Significant Governmental Interests.

Assuming, *arguendo*, that § 441a(d)(3), as construed by the Court of Appeals, burdens the exercise of First Amendment rights, it is well established that "[n]either the right to associate nor the right to participate in political activities is absolute . . . ." *United States Civil Service Commission* v. *National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548, 567 (1973). Even a significant interference with protected rights may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid the unnecessary abridgment of First Amendment freedoms. *Buckley* v. *Valeo*, 424 U.S. at 25.

1. *Section 441a(d)(3) Expenditures are not "Direct Political Expression" at the Core of First Amendment Freedoms.*

NRSC asserts that aggregated § 441a(d)(3) expenditures are a form of political expression by the Republican party, and are entitled to a degree of constitutional protection at least as stringent as that accorded independent political expenditures in *Buckley* v. *Valeo*. NRSC Br. at 25. This assertion is meritless.

First, the FECA defines § 441a(d) expenditures "in connection with the general election campaign of candidates" as "*contribution* to such candidate[s]." 2 U.S.C. § 441a(a)(7)(B)(i) (emphasis added).[55] Second, § 441a(d)(3) expenditures do not constitute direct political expression by the Republican party since they in no way communicate the policies, programs and views of the spender. Rather these expenditures merely provide financial support to the *candidate*, whose views on any number of issues may not coincide with those of the national or State Republican parties.[56] Thus, both statu-

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[55] The statute provides that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 2 U.S.C. § 441a(a)(7)(B)(i). A § 441a(d)(3) expenditure falls squarely within that definition; it is money given by a party committee directly to a supplier of services or goods for the candidate's own account, with the full prior consent and cooperation of the candidate. It is for this reason that § 441a(d) expenditures are otherwise known as "coordinated" expenditures. *See* FEC *Record*, November 1980 edition, p. 6.

[56] Petitioner NRSC also mistakenly likens § 441a(d)(3) expenditures to a candidate's contributions to himself. NRSC Br. at 26. This argument is manifestly fallacious in light of the possibility (indeed probability) that the views of the candidate and the party will differ on particular issues. Nevertheless, if NRSC's "self-support" analogy is to be pursued, the proper comparison to be drawn is that between § 441a(d)(3) expenditures and contributions by members of a candidate's family, which the Court in *Buckley* held to be lawfully limited FECA § 441a(a). 424 U.S. at 54, n.59.

torily and in functional terms, § 441a(d) expenditures are a form of contribution to the candidate, and this Court has stated:

> A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

Buckley v. *Valeo*, 424 U.S. 1, 21.

Accordingly, limitations on such expenditures do not constitute the "significantly more severe restrictions" condemned by this Court in *Buckley* v. *Valeo*, 424 U.S. at 23. Because of this, a bar to delegations of § 441a(d)(3) spending authority is "entitled to less-exacting judicial scrutiny." *Common Cause* v. *Schmitt*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9138 (D.D.C. September 30, 1980) at 51,072, and may be justified by a broader range of Congressional purposes than limitations of activities "at the core of our electoral powers and of First Amendment Freedoms" where the spender is the speaker. *Buckley* v. *Valeo*, 424 U.S. 1, 39.

2. *A Bar to Delegations of 2 U.S.C. § 441a(d)(3) Spending Authority Imposes No Material Burden on First Amendment Rights.*

A bar to delegations of § 441a(d)(3) spending authority imposes no material burden on the First Amendment rights of individual members of the Republican

party, the State political committees or the Republican National Committee.

Individual members of the Republican party are wholly unaffected by the Court of Appeals' interpretation of § 441a(d)(3). Notwithstanding the Court of Appeals' decision, an individual wishing to support financially a Republican Senatorial candidate may fully exercise his or her right of association by contributing directly to the candidate, 2 U.S.C. § 441a(a)(1), and to the national and State Republican parties, in the same dollar amounts currently specified in the Act. Such contributor may also, consistent with the Court of Appeals' decision, engage in direct political expression by making unlimited independent expenditures with respect to candidates or issues. Thus, a bar to delegations of § 441a(d)(3) spending authority leaves supporters a "wide range of ways to express their support." *Republican National Committee* v. *Federal Election Commission*, *supra at* 286.

Likewise, the Court of Appeals' decision imposes no material burden on the First Amendment rights of the State party committees. State committee authority to contribute directly to the candidate, 2 U.S.C. §§ 441a(a)(1), (2), and to engage in unlimited "get-out-the-vote" and voter registration activities is wholly unaffected, 2 U.S.C. § 431(9)(B)(ix). Moreover, contrary to NRSC's contention, State committee § 441a(d)(3) spending authority is not substantially burdened. Should the State committee wish to combine its funds with those of NRSC in order to enjoy "economies of scale," it remains free to transfer funds to or receive monies from NRSC, 2 U.S.C. § 441a(a)(4), or to devise joint expenditure programs. Similarly, if a State committee wishes to make more effective § 441a(d)(3) expenditures by employing the expertise of NRSC, it may hire NRSC staff members,

appoint NRSC as its technical advisor, or devise coordinated candidate support programs. These alternatives, *none* of which entail the assumption of § 441a(d)(3) spending authority by NRSC, demonstrate that the Court of Appeals' interpretation of § 441a(d)(3) does not "undermine to any material degree the potential for robust and effective discussion of candidate and campaign issues . . . ." *Buckley* v. *Valeo*, 424 U.S. at 29. *See generally Bread Political Action Committee* v. *Federal Election Commission*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9142 (7th Cir. December 15, 1980) at 51,086.

Finally, a bar to delegations of § 441a(d) spending authority does not materially burden the Republican party as a whole in the exercise of its First Amendment rights. The national committee and the NRSC may make a statutorily authorized direct contribution to any U.S. Senate candidate of up to $17,500, 2 U.S.C. § 441a(h), a special limit not available to any other "political committees." The national committee and any State committee may make § 441a(d)(3) expenditures, and if any such committee is unable to raise sufficient money to exercise fully this extraordinary spending authority, it may receive funds transferred for this purpose from any other party committee, including NRSC. 2 U.S.C. § 441a(a)(4). *All* Republican party committees, including NRSC, may make unlimited expenditures for such activities as party-wide voter registration and "get-out-the-vote" drives, and for candidate and campaign worker training programs. 11 C.F.R. § 106.1(c). Finally, the party committees may not only share funds, but may also freely draw upon one another's staff, technical assistance and other resources in their pursuit of common party goals. All of these practices promote intraparty cooperation toward the goal of electing Republican Senatorial candidates, yet preserve the separate fund-raising and organizational identities and functions of the national and State political parties. The "agency" agree-

ments, by contrast, emasculate the State committees' role in Senatorial elections by reducing it to little more than an accounting convenience serving to double the expenditure authority of the national party. Such a result frustrates Congress' intention to promote vigorous State party organizations as an essential complement to the national parties.[57]

3. *Congress' Vital Interest in Fostering Active State Political Parties Overrides the Marginal Burden on First Amendment Rights Imposed by a Bar to Delegations of § 441a(d)(3) Spending Authority.*

This assumption by NRSC of State committees' § 441a (d) (3) spending authority is not necessary for effective political association and expression by the national party, the State committees, and individual Republicans. On the contrary, though presented in "agency" terminology, this arrangement requires the principals in the purported agency, *i.e.*, the State committees, to surrender all control whatsoever over the manner in which funds are expended in their name. Thus the agreements, in practical effect, facilitate the abdication of the fund-raising and spending functions of the State committees in favor of a national-level political committee, the NRSC. Such a result frustrates the fundamental interest underlying Congress' grant of § 441a(d) spending authority to the State committees, that of active participation by State

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[57] In its Brief, NRSC argues implicitly that the delegation agreements are simply a matter of internal Republican party organization. *See esp.* NRSC Br. at 25, n.33, *citing Ripon Society, Inc.* v. *National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) *en banc, cert. denied*, 424 U.S. 933 (1976). This assertion fails to recognize that the manner in which § 441a(d)(3) spending authority is employed is not solely a matter of internal party organization, but must be guided by Congress' authority to regulate the financing of political campaigns. *United States Civil Service Commission* v. *National Association of Letter Carriers, AFL-CIO, supra.*

and local political parties in the federal elective process.

NRSC contends, however, that this Congressional concern with vigorous State party organizations "does not rise to the compelling level necessary to support a restriction on political expression and association . . . ." NRSC Br. at 28-29. In fact, it is difficult to conceive of an interest more compelling or more deserving of Congress' attention in the exercise of its constitutional authority to conduct federal elections. *See* Article I, § 4, of the United States Constitution; *United States* v. *Classic*, 313 U.S. 299 (1941); *Smiley* v. *Holm*, 285 U.S. 355 (1932). Active, healthy State and local parties have long been viewed as critical to the very maintenance of a robust federalism.[58] Any decline in the strength or involvement of such parties would lead to centralization or nationalization of the political party structure, with the result that representation of State and local interests in national affairs would be diminished.[59] In § 441a(d), as well as in other key provisions of the FECA, Congress expressly sought to bolster this critical national-State component to political party activity.[60]

The NRSC-State committee agency agreements completely undermine this Congressional initiative. The agreements represent full and unconditional surrender by State committees, to the national level, of their fund-

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[58] *See Grodzins*, "Party and Government in the United States," in *Political Parties U.S.* (1961), where the author points out that the decentralized party system mirrors and reinforces the federalist constitutional structure, and that centralization of the party structure would eliminate the "sharing of functions" which is the "hallmark of modern American federalism." *See also* Ranney & Kendall, *Democracy and the American Party System* (1956) pp. 488-513.

[59] It is the same concern with overcentralization, at the expense of State and local political strength, that has also animated the current debate over the electoral college system of Presidential selection. *See, e.g.*, Diamond, *The Electoral College and the American Idea of Democracy* (1980).

[60] *See* discussion *supra* at 27-30.

raising and spending role. This result virtually stands § 441a(d) on its head. Where Congress has sought to preserve the basis for State and local party financing of Congressional elections, the agency agreements redirect spending power to the national level. In lieu of assisting with the promotion of State party activity in the current political environment, delegation of § 441a(d) spending authority serves only to further aggregate national power at the expense of State and local party organs.[61]

The NRSC's indifference to this result is all the more striking since the Republican party has emerged as the staunchest advocate of vital State and local party organizations. *See* Crotty, *Political Reform and the American Experiment* (1977) pp. 255-60. A graphic example of this advocacy can be found in the proclamation of the "Rule 29 Committee," an official party committee authorized by the 1972 Republican National Convention to review and study party rules. This committee recommended that the preamble to proposed party bylaws declare that "[a]ll authority, therefore, resides in [the party's] constituent units consisting, first, of its local organizations, then its State committees and only then in its national committees," and that "the work of the party is done by the State and local organizations." Similarly, a resolution approved by this committee stressed that "the most important function of the Republican National Committee is to assist State and local parties in their organizational efforts" and that "the most important function of State parties should be to assist in building local party organizations . . . ." *See*

[61] The impact of recent campaign financing and other political reform on the health of State and local parties was recently analyzed at length by Professor Ralph K. Winter, in the "New Age of Political Reform: Looking Back," Georgia Law Review (Fall 1980), pp. 1-18. Professor Winter concludes that "[l]ocal parties must be strengthened if we are to have parties at all. We are too large and diverse a nation to build parties from the top down."

Report of the "Rule 29 Committee" (issued by the Republican National Committee in 1975), pp. 29-30. Thus the position taken by the NRSC in this case, namely, that the Congressional interest in strong State and local parties is viewed as not "compelling," represents a radical departure from this philosophy.[62]

4. *The Court of Appeals' Interpretation of § 441a (d)(3) Was Proper and Does Not Render the Statute Unconstitutionally Vague.*

The Court of Appeals' interpretation of § 441a(d)(3) is consistent with the plain meaning of the statute and does not render the statute unconstitutionally vague. The ban on State committee delegations of § 441a(d)(3) spending authority is not derived from any vague statutory terms; rather it reflects the Court of Appeals' refusal to acquiesce in the FEC's own novel and unsupportable statutory interpretation. This is not a case in which a statute will bear two equally obvious interpretations, only one of which is clearly in accordance with the Constitution.[63] Where, as here, only one interpreta-

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[62] The NRSC's indifference to this long-standing Republican concern also casts doubt on its assertion that § 441a(d) "agency" agreements constitute "political expression by the Republican Party." NRSC appears to be speaking only for its own narrow political interests, not for its party, in entering into arrangements which enhance national spending power in federal elections at the expense of the States and localities.

[63] NRSC's assertion that § 441a(d)(3) is constitutionally inadequate due to its failure "to provide a precise prohibition of agency agreements," NRSC Br. at 31, n.38, widely misses the mark. The statute, at a minimum is "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." *United States Civil Service Commission* v. *National Association of Letter Carriers, AFL-CIO, supra.* Indeed, the statute is mathematically precise; it is difficult to conceive of terms less likely to entrap the unwary. Moreover, NRSC's allegation of "vagueness" is not supported by its invocation of its possible liability for *criminal* violation of § 441a. The imposition of even a *civil* penalty is the remotest of possibilities in this case. *See Federal Election Commission* v. *National Right to Work Com-*

tion may be fairly derived from the relevant materials, "[t]he rule of construction to be invoked when constitutional problems lurk in an ambiguous statute does not permit disregard of what Congress commands." *United States* v. *UAW*, *supra* at 589.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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mittee, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9122 (D.D.C. April 24, 1980) at 50,945. In light of the FEC's lengthy, though flawed, deliberations concerning the delegation agreements (upon which NRSC to some degree relied), it strains credulity for NRSC to assert that the Court of Appeals' decision, if affirmed, is likely to lead to imposition by the FEC of such a penalty. *Cf. Eccles* v. *Peoples Bank of Lakewood Village, California*, 333 U.S. 426 (1948). At most, FEC enforcement of a court order invalidating State committee agency agreements under § 441a(d) would result in settlement with the NRSC through "informal methods of conference, conciliation, and persuasion" culminating in a "conciliation agreement." *See* 2 U.S.C. § 437g(a)(4)(A).